87 1107

DEC 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE POYSKY, doing business as
ALASKA TOWING CO., and
SAMOAN MARITIME, LTD., a corporation,

*Petitioners,*

v.

PACIFIC MARINE INSURANCE CO., a corporation, and
DILLINGHAM TUG & BARGE CORPORATION, *in personam*,
and TUG MIKIALA II, *in rem*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN F. MEADOWS
*Counsel of Record*
Meadows, Smith & Brown
425 California Street
Suite 1700
San Francisco, California 94104
(415) 981-5277
*Counsel for Petitioners*

December 30, 1987

CHAS. P. YOUNG CO. • 425 CALIFORNIA ST. • S.F., CA 94104 • (415) 951-1300

100 pp

## QUESTIONS PRESENTED

**A. As to respondent Pacific Marine Insurance Company:**

1. Whether there is a judicially established Federal admiralty rule creating an implied absolute warranty of seaworthiness in a hull insurance policy, regardless as to whether it is voyage or time, which, on breach, will void the policy and deny the insured owner coverage for a constructive total loss, or is the decisional law of the State most involved in the insurance transaction, which declares such forfeitures to be against public interest, to be applied instead?

2. Whether, if there is such a judicially created Federal admiralty rule, the standard of seaworthiness imposed thereby is a relative one so that, when the insured vessel is a harbor lighter, it need only be able to withstand all ordinary perils in a harbor, i.e., be "portworthy," and therefore the perils of the sea against which it is insured will be such perils as would be extraordinary to a vessel of its type and other characteristics known to the insurer.

3. Whether the express waiver of any breach of warranty in the "Held Covered" clause of the hull insurance-policy is inapplicable where the breach is of an implied warranty of seaworthiness causing the constructive total loss of the vessel but applicable if the damage is less than major.

4. Whether, even if there is an applicable implied warranty of seaworthiness and its breach is not waived by the "Held Covered" clause, does the *Inchmaree* clause of a hull policy, expressly covering losses directly caused by a latent defect, waive the breach of the implied warranty if it also constitutes a latent defect?

5. Whether the insurer under a hull insurance policy may rescind the policy on receiving a constructive total loss claim without returning or at least tendering the premium paid by the insured for the policy.

6. Whether a claim under a marine insurance policy covering the hull of an unmanned barge may be denied on the ground that the vessel's damage was "ordinary wear and tear" on a deteriorated hull and therefore not covered as a

peril of the seas when the damage the vessel incurred during an ocean tow was enhanced by the elements.

**B. As to respondent Dillingham Tug & Barge Corporation:**

1. Whether, under the implied warranty of workmanlike service owed by a professional tower to the owner of an unmanned barge, the barge's owner has the burden of proving negligent performance by the tower before it can recover for damage to the barge or its loss occurring during the tow.

2. Whether, under warranty law as applied to a professional tower, knowledge of the risks that an expert in the field would have is imputed to the warrantor (tower) and its only defense is that the warrantee (barge owner) hindered its performance of the tow.

3. Whether as a matter of law it is a breach of the tower's warranty of workmanlike service not to head to a nearby port of refuge when it becomes or should be obvious to those on the tug that the unmanned barge is in danger, even if due to a latent, pre-existing unseaworthy condition which is now manifesting itself.

4. Whether a representation contained in the contract for the towing of a vessel (an ex-Navy WW-II harbor lighter) that the tow "shall be seaworthy and in all respects ready for and capable of making the specified voyage" can be interpreted to require the tow's absolute seaworthiness in any weather, regardless of the type of vessel involved, the due diligence of the tow's owner to prepare it for sea, his lack of knowledge of any unseaworthy condition, the lack of reliance by the tower as evidenced by its having inspected the vessel to verify compliance with the tow survey's recommendations and subsequent events occurring at sea, such as an emergency requiring towing by other than the regular bridle.

## LIST OF PARTIES AND RULE 28.1 LIST

The following listed parties have an interest in the outcome of this case:

**Petitioners, insureds and additional insureds of YCV-9:**

George Poysky, dba Alaska Towing Co.
Samoan Maritime Ltd.
Max Rouse & Sons, Inc.
Max Rouse & Sons, Northwest (Affiliate of Max Rouse & Sons, Inc.)
Morton Marine, Inc.
Dillingham Tug & Barge Corporation

Those not having appeared filed ratifications pursuant to Rule 17(a), FRCivP.

**Respondents:**

Pacific Marine Insurance Company
Dillingham Tug & Barge Corporation (a subsidiary of Dillingham Corporation)

## TABLE OF CONTENTS


| TITLE | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES and RULE 28.1 LIST | iii |
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY PROVISIONS DISCUSSED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 6 |
| (a) State Law, Federal Law and The Policy Itself Precluded Forfeiture of The Benefits of The Policy Based on an Implied Absolute Warranty of Seaworthiness | 9 |
| (b) The Law Applying a Warranty of Workmanlike Service to the Professional Tower Does Not Require Proof of the Tower's Negligence and, Where Such a Tower Has Complete Control of the Towed Vessel, as Where It is Unmanned, It Should be Strictly Liable Where Damage or Loss is Incurred by the Tow that was Avoidable | 19 |
| (c) The District Court Interpreted the Representation of the Tow's Owner that the Tow Shall Be Seaworthy and Ready For Sea as Equivalent to the Absolute Warranty of Seaworthiness, a Violation of the Rule of Bisso. | 23 |
| CONCLUSION | 25 |
| APPENDIX | 1a |

## TABLE OF AUTHORITIES


| Cases | PAGE |
|---|---|
| Ahmed v. Amer. SS Owners Mut. P&I Assoc., 444 F.Supp. 569 [ND Calif. 1978] aff'd 640 F.2d 993 [9th Cir. 1981] | 14, 16 |
| Avemco Ins. Co. v. Chung, 388 F.Supp. 142 (D. HI 1975) | 13 |
| Bd. of Com'rs v. FARNSUM, 574 F.2d 289 (5th Cir. 1978) | 20 |
| Bisso v. Inland Waterways, 349 U.S. 85, 75 S.Ct. 629 (1955) | 8, 22, 24-25 |
| Boston Metals v. SS WINDING GULF, 349 U.S. 122 (1955) | 24 |
| CalMar SS Co. v. Scott, 345 U.S. 427, 1953 AMC 952 (1953) | 13 |
| Campbell v. Hartford, 533 F.2d 496, 497-8 [9th Cir. 1976] | 16 |
| Chemical Transporter, Inc. v. M. Turecamo, Inc., 290 F.2d 496, 497 [2d Cir. 1961] | 20 |
| Cia. de Navegacion v. Fireman's Fund Inc. Co. (The WASH GRAY), 277 U.S. 66, 80 (1928) | 8, 10, 11 |
| Crumady v. The J. H. FISSER, 358 U.S. 423, 428-9, 79 S.Ct. 445, 448 (1958) | 23 |
| Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086, 1091 (9th Cir. 1983), cert.den. 465 U.S. 1025, 104 S.Ct. 1280 (1984) | 20, 21, 24 |
| Dixilyn Drill. Corp. v. Crescent Towing & Salvage, 372 U.S. 697, 698, 83 S.Ct. 967, 968 (1963) | 24 |
| Dunbar, Admx. v. H. Dubois Sons, 275 F.2d 304, 1960 AMC 1393 (2d Cir. 1960) | 19 |
| East River SS Corp. v. Transamerica Delaval, ____ U.S. ____, 106 S.Ct. 2295 (1986) | 22 |
| Eggers v. Nat'l Union Fire Ins. Co. (Texas No. 1) 112 F.2d 541 (5th Cir. 1940) | 17 |
| Fairmont Shipping Corp. v. Chevron Int'l Oil Co., 511 F.2d 1252 (2d Cir. 1975), cert. den. 423 U.S. 838 (1975) | 19, 22, 23 |

**Cases** PAGE

Fluor Western v. G&H Offshore Towing, 447 F.2d 35 (5th Cir. 1971) ..... 24

Frangos v. Sun Ins. Co., L.L.R., Vol. 49, p. 354 ..... 19

Gaymon v. Prud. Lines, 473 F.Supp. 161, 164 (SDNY 1919) ..... 19

Greenock SS Co. v. Maritime Ins. Co., 1 K.B. 367 (1903) ..... 15

Gwynedd Corp. v. Chilula, U.S.A. 1979 AMC 531, 542-3 (SDNY 1978) (N.O.R.) ..... 19

Healy Tibbitts Constr. Co. v. Foremost Ins. Co., 482 F.Supp. 830, 835 [ND Cal. 1979] ..... 14, 16

Henjes v. Aetna, 132 F.2d 715, 719 (2d Cir. 1943) .... 12

Hercules Inc. v. Stevens Shipping Co., 698 F.2d 726, n. 25 at 737 [5th Cir. 1983] ..... 20, 24

Italia Soc. v. Oregon Steve. Co. 376 U.S. 315, 318, 84 S.Ct. 748 750-1 ..... 22, 23

James McWilliams Blue Line, Inc. v. Esso Standard Oil Co., 245 F.2d 84, 1957 AMC 1213 (2d Cir. 1957) ..... 19

Kalmbach v. Ins. Co. of Penn, 529 F.2d 552, 555-557 [9th Cir. 1976] ..... 16

King Fisher Marine v. NP SUNBONNET, 724 F.2d 1181 (5th Cir. 1984) ..... 22

Klein v. Globe & Rutgers Fire Ins. (The TORNADO), 2 F.2d 137 (3d Cir. 1924) ..... 11

Kossick v. United Fruit, 365 U.S. 731 733, 81 S.Ct. 886, 889 (1961) ..... 8

Luria Bros. v. Alliance Assur., 780 F.2d 1082, 1986 AMC 1539, 1549-1551 (2d Cir. 1986) ..... 16

McDonough Marine Serv. v. M/V ROYAL STREET, 465 F.Supp. 928, 935 (ED La. 1979) ..... 21

Mellon v. Fed. Ins Co., 14 F.2d 997, 1002 (SDNY 1926) ..... 17

Moran Towing v. M.A. Garmino Constr. Co., 363 F.2d 108 (1st Cir. 1966) ..... 19

**Cases** PAGE

Morrison Grain Co. v. Utica Mut. Ins. Co., 632 F.2d 424, 428 n.41 (5th Cir. 1980) ..... 25

Offshore Co. v. G&H Offshore Towing, 262 F.Supp. 282, 287 (SD Tex. 1966) aff'd. 403 F.2d 715 (5th Cir. 1968) ..... 20

Pillsbury v. Delta B&R, 1979 AMC 1221, 1233 (ED La 1978) ..... 21

PPG Ind. v. Ashland Oil Co., 592 F.2d 138 (3d Cir. 1978) ..... 24

Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 262 U.S. 487, 1924 AMC 107 (1924) ..... 13

Redna Marine v. Poland, 46 FRD 81, 87 (SDNY 1969) ..... 19

Russell Mining Co. v. Northwestern Fire & Marine Ins. Co., 207 F.Supp. 162, 166 (ED Tenn. 1967) ..... 11

Ryan Stevedore v. Pan-Atlantic SS Co., 350 U.S. 124, 76 S.Ct. 232 (1956) ..... 8, 20

Seas Shipping Co. v. Sieraki, 328 U.S. 85, 66 S.Ct. 872 (1946) ..... 22

Sorenson & Neilson v. Boston Ins. Co., 10 F.2d 563, 565-7 (D. Md 1925) ..... 12

South v. Moran Towing, 360 F.2d 1002 [2d Cir. 1966] ..... 20

Spooner v. Conn. Fire Ins. Co., 314 F.2d 753, 756 (2d Cir. 1963) ..... 11

Standard Oil of N. J. v. U.S., 340 U.S. 54, 1950 AMC 365 (1950) ..... 13

Sternberg Dredging v. Moran Towing, 196 F.2d 1002, 1005-6 [2d Cir. 1953] ..... 20

Stevens v. THE WHITE CITY, 285 U.S. 195, 202 (1932) ..... 22

Tebbs v. Baker-Whitely Tow. Co., 407 F.2d 1055 (4th Cir. 1969) ..... 20

The ANTHONY D. NICHOLS, 49 F.2d 927 (SDNY 1931) ..... 16

**Cases** PAGE

The NATALIE, 1959 AMC 2379 (NY ARB).....12

The OSCEOLA, 189 U.S. 158, 23 S.Ct. 483 (1903).... 22

The ROCONA v. Guy F. Atkinson Co., 173 F.2d 661, 665 [9th Cir. 1949]..... 21

The Soerstad, 257 F. 130, 131 (SDNY 1919)..... 19

The SPOT PACK, 242 F.2d 385, 392 (5th Cir. 1957)..... 17

The Steamer WEBB, 81 U.S. (14 Wall.) 406, 414 (1871)..... 20

The XANTHO, 12 App. Cas. 503, 509(1887) ..... 11

Tropical Marine Prod. v. Birmingham Fire Ins. Co., 247 F.2d 116, 123 (5th Cir. 1957) cert. den. 355 U.S. 903 (1957)..... 16, 17

Twenty Grand Offshore Inc. v. W. India Carriers, 492 F.2d 679 (5th Cir. 1974)..... 24

U.S. v. Tug MANZANILLO, 310 F.2d 220 (9th Cir. 1962)..... 20

USF&G v. Leong Dung Dye, 52 F.2d 567, 570-1 [9th Cir. 1931]..... 16

Vella v. Ford Motor Co., 421 U.S. 1, 3, 95a S.Ct. 1381, 1383, 1975 AMC 563 (1975)..... 6

Wilburn Boat Co. v. Fireman's Fund, 348 U.S. 310, 320-1, 75 S.Ct. 368, 374 [1955])..... 6, 8, 10, 13-15

Yacht DUET, 1967 AMC 1144 (D.Oreg. 1967)..... 19

**Statutes**

FRE 201(b)(2) and (f)..... 9

Hawaii Rev. Stats. §431-419..... 2, 13

Marine Insurance Act of 1906 (MIA), 6 Edw. 7 ch. 41..... 2, 7, 10, 13

Supreme Court Rules Rule 17..... 8

28 U.S.C. §1254(1)..... 2

| Texts | PAGE |
|---|---|
| 1 ARNOULD'S LAW OF MARINE INSURANCE AND AVERAGE (16th ed.) | 10, 17, 18 |
| 3 Amer. Law of Prod. Lia. 3d §33:5 | 21 |
| 9 COUCH ON INSURANCE 2d, §37B:357, p. 271 | 10 |
| 16 C. Appleman, INSURANCE LAW OF PRACTICE, §9260 at p. 393 (1981) | 16 |
| Buglass, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES (2d ed.) pp. 36-7 | 12, 17 |
| Gilmore & Black, THE LAW OF ADMIRALTY (2d ed.) pp. 63-67 | 11, 14, 25 |
| Keeton, "Insurance Rights at Variance with Policy Provisions", Vol. 83 Harv. L.R. [March 1970] at p. 968) | 16 |
| Parks, THE LAW OF TUG, TOW AND PILOTAGE (2d ed.) 538, 548-560 | 25 |
| Parks, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE (1987) at n. 846, p. 1039 | 6, 14 |
| Prosser, LAW OF TORTS (5th ed.) §98 pp. 692-4 | 22 |
| Schoenbaum, ADMIRALTY AND MARITIME LAW (1987) at pp. 425, 561 | 13, 24 |
| Vol. 44, No. 10, Proceedings of The Marine Safety Council, pp. 264-266 | 9 |
| Vol. 41, Tulane Rev. 245, 250 | 25 |

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

GEORGE POYSKY, doing business as
ALASKA TOWING CO., and
SAMOAN MARITIME, LTD., a corporation,

*Petitioners,*

v.

PACIFIC MARINE INSURANCE CO., a corporation, and
DILLINGHAM TUG & BARGE CORPORATION, *in personam*,
and TUG MIKIALA II, *in rem*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, George Poysky, dba Alaska Towing Co., and Samoan Maritime, Ltd., respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 1, 1987.

## OPINION BELOW

The opinion of the Court of Appeals, marked "Not for Publication", appears in App. A, *infra.* Findings of Fact and Conclusions of Law of the District Court for the District of Hawaii, not yet reported, appear in App. C, *infra.*

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 1, 1987. A petition for rehearing and suggestion for rehearing *en banc* was filed on May 15, 1987 and denied on October 7, 1987. App. B *infra.* This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS DISCUSSED

Hawaii Rev. Stats. § 431-419.

Marine Insurance Act of 1906 (MIA), 6 Edw. 7 ch. 41.

(See App. F *infra.*)

## STATEMENT OF THE CASE

This is a first party action by the insureds (plaintiffs and petitioners, hereinafter "Poysky") on a policy of marine insurance (hull) issued by defendant Pacific Marine Insurance Company (Pacmar) and covering two harbor lighters for $225,000 each while towed by Dillingham Tug & Barge Corporation (Dillingham) from Pearl Harbor, Hawaii to Seattle, "or held covered". Dillingham was joined as a defendant, one of the causes of action being for breach of the implied warranty of workmanlike service owed by a professional tower in the circumstances of this case. Poysky paid Dillingham $75,000 in advance for the tandem tow. (Finding of Fact [FF] 14, App. C.) The insurance was placed from Honolulu (FF 24) and written by endorsement to an existing time policy covering another vessel owned by Samoan Maritime, Ltd., a company with which Poysky is affiliated. (FF 25.) The endorsement for the two barges, which also covered Dillingham as an additional insured with waiver of subrogation, incorporated all terms of the original policy. (For the Policy and Endorsement 2, see App. E.) YCV-9, as the "Y" in its designation indicates, was a "yard", or harbor lighter, 200 ft. long, 65 ft. in beam, 12 ft. deep at either rake (but only 9 ft. deep inboard of the rakes [RT 130:23-131:10, App. H]). (FF 5.) The "CV" stands for carrier vessel, meaning aircraft carrier (ferrying planes around Pearl Harbor).

(FF 6.) Poysky had, shortly before placing the insurance on the two barges, been the high bidder for them at auction conducted by the Navy. They had been moored at Pearl Harbor for an unknown length of time. Poysky, along with other potential buyers from the mainland, had surveyed them extensively before bidding. (FF 7-13.) Some of the surveys of YCV-9 included multiple ultra-sound readings of the steel thickness of the deck, sides and bottom. (FF 9, 12.) Poysky, however, used a surveyor's hammer in all 18 of the barge's compartments and did not know of the existence of the other surveys. (FF 10, RT 73:1-77:23, App. H.) The bottom of neither barge was surveyed, except by ultra-sound gauging, because they were afloat. (FF 10.) The written survey of YCV-9 by Capt. Dickieson, made for an unsuccessful bidder, expressly stated that the condition of the bottom could not be determined without hauling it out. (FF 10.) According to another marine surveyor, Anderson, there was no way of determining the condition of the bottom without having the vessel drydocked. (FF 13.) Poysky was unable to ascertain the condition of the bottom of YCV-9, however, even after he was awarded the vessel, because there was no suitable drydock available in Hawaii. (FF 11.)

Prior to commencement of the tow, a marine surveyor was hired (the same Capt. Dickieson [RT 101:3-12]) to conduct a pre-tow survey of the barges and to specify all preparations needed to make them "ready in all respects to be towed to the U.S. mainland." (FF 18.) Dillingham's port captain, Kapele, supervised the actual hook-up to the Dillingham tug MIKIALA II and verified that all Capt. Dickieson's recommendations had indeed been carried out. (FF 21.) On departure, visual inspection of YCV-9 did not disclose any condition which might suggest that it was unsound or unfit for the tow. (FF 22, 30.)

On the night of September 26, 1982, after two days of towing through rough seas at full towing speed and when wind velocity and wave height began to further increase, the lower leg of the "Y" shaped bridle, which acts as a shock absorber and is called the "surge chain" (composed of a 70-ft. length of stud-link chain each link of which was

formed by steel 1¼ to 1⅝ inches in diameter), broke. (FF 19, 30-33.) This occurred 270.3 miles out of Pearl Harbor (and 2,151.5 mi. from Seattle [RT 1454:11-16]), but the tug, instead of returning to port to fix the bridle (the tug crew tried and failed to accomplish this at sea on October 2 when the weather eased up [RT 1397:7-1398:10]), chose to continue to tow the rectangularly-shaped barge by its emergency tow line affixed to a corner of the vessel. (FF 34, 42.) However, six days later and 960.5 miles out from Pearl Harbor (and 1,459.1 mi. from Seattle [RT 1442:4-25]), YCV-9 for the first time showed damage — a crack in the leading corner, through which it then slowly began to fill. (FF 41.) The tug then moved the emergency tow line and started towing YCV-9 from a corner of the stern. (FF 41.) Other damage developed during the tow which breached more compartments on one side than on the other, causing the barge to fill unevenly, so that it arrived in Seattle (eight days late) floating at a 20-30% angle (RT 103:1-19). It was a constructive total loss (CTL). The other WW-II barge, also a "Y", towed in the usual fashion by its bridle, arrived undamaged.

On the arrival of the barges in Seattle, Poysky sought to have the coverage continue on the barges but Pacmar denied the request. On being drydocked, according to the District Court's findings based on the testimony of defendants' marine surveyors, the bottom and sides of YCV-9 were found to be "substantially wasted [up] to the wind and water line, especially at the turn of the bilge". The Court found that this wastage pre-existed the voyage. (FF 49.) There was also a fracture in the hull similar to one which could have been made if the tug had come alongside in rough weather (it did). (FF 54, 42.) Damage caused by slamming was also observed as well as missing plates "as to which there is only speculation as to the potential causes." (FF 55, 56, 58.)

On claim for a CTL being filed, Pacmar denied it on the basis (sustained by the District Court) that the hull policy as to YCV-9 was voided by the insured's breach of an implied

"absolute warranty of seaworthiness contained in every voyage policy", because, though Pacmar admitted that the insured had no actual knowledge of any defects in the barge, the vessel was "not reasonably fit for its intended use" because of "severe wastage/deterioration" of its underwater hull and therefore unseaworthy. (FF 61, Conclusions of Law [CL] 21 and 22.) Pacmar's rejection letter (App. G) was also based on a general allegation that the CTL was not due to any "peril" covered by the policy, which the District Court sustained through a "conclusion" that the damage resulting in the CTL was "ordinary wear and tear during the voyage" and therefore not a peril of the sea. (CL 24-27.) Judgment was entered for Pacmar and Dillingham, the latter on the basis that Poysky had breached what the District Court concluded was a representation of seaworthiness (called a "warranty" by the Court of Appeals) and because Poysky had failed to meet his burden of proof as to the tower's negligence, even though the Court acknowledged that there is an implied warranty of workmanlike service contained in the towage contract. (CL 5-9.) Judgment was entered for Poysky for the amount of the premium paid for YCV-9's coverage which had not been tendered back when Pacmar voided the policy. Dillingham's claim for charges at the contract rate for the 8 days delay en route was denied because the "delay due to heavy weather and delay due to the unseaworthy character of the barge cannot be separated", which is inconsistent with the causation findings elsewhere. (CL 10. See also FF 45, CL 21.)

Poysky and Samoan Maritime, in their appeal to the Ninth Circuit Court of Appeals from the judgment as to both defendants, attacked the Findings of Fact as being clearly erroneous and inconsistent but alternatively appealed as to prejudicial, material errors of law requiring reversal even if the findings were not clearly erroneous. The Court of Appeals panel, however, in their order for judgment, dealt only with the appeal as to Dillingham.

## REASONS FOR GRANTING THE PETITION

This petition concerns the law applicable to two highly specialized industries vital to the maritime commerce of the United States: marine insurance (termed "one of the great enterprises of the nation" by this Court in *Wilburn Boat Co.* v. *Fireman's Fund,* 348 U.S. 310, 320-1, 75 S.Ct. 368, 374 [1955]) and the tug and barge industry. The case has already garnered a great deal of notoriety in these industries and is mentioned in Alex Parks's new two volume text, 2 THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE (1987) at n. 846, p. 1039. The reference in Parks is to the effect that "[T]he courts found that there was no bad faith involved in the underwriter's refusal to pay benefits under the policy and that the plaintiff/insured had breached the warranty of seaworthiness. The case is now on appeal." Regardless of the "Not to be published" designation,[1] that there was an affirmance has already been published in the official reports. 817 F.2d 106 (9th Cir. 1987). Accordingly, in Park's next supplement to the text, the findings and conclusions below and their affirmance will undoubtedly be discussed whether the FF/CL are reported elsewhere or not.

As a result of the decision and its affirmance, the so-called "American Rule," which is only mentioned in some Second and Fifth Circuit cases as dicta, has for the first time been

---

[1] "An opinion is written primarily to tell the litigants why the case has come out as it has and to provide guidance to future litigants." Vol. 64 ABA Journ. (August 1978), "The Enigma of Unpublished Opinions" by Herbert J. Stern, U.S. District Court Judge for District of N.J. The Ninth Circuit's unpublished decision in our case is obviously premised on the mistaken idea that the determination of the controversy has no actual value to other litigants whose claims may be similar. Hopefully, we will be able to show that the issues in this case are indeed of vital concern to the two industries involved. And whether published or not, the Circuit Court's judgment affirming the decision below is going to impress the next District Court judge faced with any of these issues and presented with a copy of the FF/CL of Chief Judge Fong. In any event, this Court has reviewed and even reversed unpublished Circuit Court opinions. E.g., *Vella* v. *Ford Motor Co.*, 421 U.S. 1, 3, 95a S.Ct. 1381, 1383, 1975 AMC 563 (1975).

made the basis for a decision, and as a result, owners claiming damage to their vessels under the hull policy, whether voyage or time (see § 25 MIA, App. F), will forfeit coverage on breach of an implied warranty of *absolute* seaworthiness (same thing: absolute implied warranty of seaworthiness). Even where, as in this case, the insurer had as much knowledge as the insured had of the vessel's type, age and the dangers of the voyage to be made, the insured, contrary to his reasonable expectations, will find that by an *implied* exclusion he has become the insurer himself. And it will make no difference that the insured exercised due diligence to prepare the vessel for sea, or that the vessel was in an outport without facilities, such as a drydock, whereby the owner could discover if there was a breach, or that the unseaworthiness was a latent defect covered under the *Inchmaree* Clause. Also, the presence in the policy of an express "Held Covered" Clause waiving breach of "any" warranty on payment of an "equitable" additional premium will avail the insured nothing, despite his reasonable expectations, against the implication of this warranty of absolute seaworthiness if the loss is total, or a CTL, or the damages are major (exclusions *not* set out in the "Held Covered" Clause).

Then, as to owners of vessels towed by professional towers, a clause in the towage agreement "warrant[ing] and represent[ing]" that the tow is seaworthy and ready for sea has become, through this decision (even though the District Court calls it a "representation"), yet another warranty of absolute seaworthiness whereby the tower does not even need to inspect the vessel before undertaking the voyage nor need to go to a port of refuge when the barge becomes distressed. Then, if the tow's owner, who may have had no witnesses to what happened at sea, can manage to dispute the Tower's claim that the damage or loss was due to the barge's unseaworthiness, he must, contrary to Second and Fourth Circuit law based on decisions of this Court, go on to prove the tower's negligence.

The distortion of the applicable law by the decision below, to the point that the rights of owners of insured vessels and owners of tows are returned to square one where they were

thirty years ago, i.e., before *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.,* 348 U.S. 310, 75 S.Ct. 318 (1955), before *Ryan Stevedore* v. *Pan-Atlantic SS Co.,* 350 U.S. 124, 76 S.Ct. 232 (1956), before *Bisso* v. *Inland Waterways,* 349 U.S. 85, 75 S.Ct. 629 (1955) and even before *Cia. de Navegacion* v. *Fireman's Fund Inc. Co. (The WASH GRAY),* 277 U.S. 66, 80 (1928), very much warrants, we respectfully suggest, this Court's review and clarification of the questions presented. Because of the double appeal, we doubt if there will ever be a better vehicle coming before this Court for resolution of these questions.

We submit, then, that the District Court and the Ninth Circuit have, in this matter, decided important questions of Federal law in a way conflicting with applicable decisions of this Court as well as with decisions of other Circuits and of the State of Hawaii. (Rule 17, Supreme Court Rules.) Additionally, in relation to Pacmar, this case presents questions as to the interplay of State and maritime law as to which great confusion exists because of the resistance of text writers and various courts to this Court's decision in *Wilburn Boat,* supra. (As to the propriety of this ground, see *Kossick* v. *United Fruit,* 365 U.S. 731, 733, 81 S.Ct. 886, 889 [1961]). We also submit that the Circuit Court's judgment, obviously dealing with only one of the two appellees despite the discrete appeal as to the other appellee, has, in leaving only half of the case reviewed and decided, yet affirming the whole matter below, and in dealing with such important issues as are involved here by an abbreviated "Not to be published" order, has "so far departed from the accepted and usual course of judicial proceeding . . . as to call for an exercise of this Court's power of supervision." (Rule 17, Supreme Court Rules.) We respectfully suggest that these compelling grounds, discussed in depth *infra,* exist for granting a writ of certiorari as to the questions presented as set out above.

**(a) State Law, Federal Law and The Policy Itself Precluded Forfeiture of The Benefits of The Policy Based on an Implied Absolute Warranty of Seaworthiness.**

The principal danger portended by this case to insured vessel owners is the holding that *both* the implied warranty of seaworthiness and the perils of the sea which are covered risks in the policy are fixed and absolute, without regard to the type of vessel, the waters on which it was designed to be operated, the mode of tow for which it was designed, its age, the limitations existing in the particular port from which the voyage is to commence as to ascertainment of its true condition, the insured's diligence in readying the vessel for sea, and what the insured knew and communicated to the insurer. True, the District Court, affirmed by the Ninth Circuit, held that such a warranty means that the vessel must be "reasonably fit for its intended use" (CL 21) but, after giving this principle no more than lip service, the District Court went on to ignore that YCV-9's intended use was as a harbor lighter. The District Court was really implicitly determining that YCV-9 was unseaworthy because it was not able to withstand perils of the seas that any barge should, in the Court's opinion, have been able to withstand and ignoring what, for a harbor lighter, were extraordinary perils both of the seas and the mode of towing, such as being towed without a bridle (including the surge chain, the shock absorber) and by a corner nearly all the way across the eastern Pacific. The District Court's absolute standard of seaworthiness resulted in its ignoring the fact that the barge withstood without damage two days of being towed by its bridle in heavy weather and six more days of being towed by a corner. (See as to the effects experienced by inland waters barges in rough seas, Vol. 44, No. 10, Proceedings of The Marine Safety Council, pp. 264-266, a Government (USCG) publication, which states, "Complete failure of the hull can result from continuous pounding for even a short time. This danger is particularly great for towed barges, since nobody is aboard to feel that the barge is pounding." We submit that judicial notice may be taken of these USCG reported examples even at this stage of the action. FRE 201(b)(2) and (f).)

This erroneous standard of seaworthiness is also manifested in the District Court's findings that the abstract vessel it assumed YCV-9 to be was not subjected to abnormal stresses by being towed by a corner and without a bridle (FF 40), that YCV-9's plating had "offered no resistance to normal sea conditions" (FF 56), and that "Slamming the barge into seas would not cause loss of the structural members" (FF 55 and 58). For a barge designed for ocean towing, perhaps, but how about a harbor lighter?

This Court made it crystal clear long before the *Poysky* case that, under an implied warranty of seaworthiness in a voyage policy, there is no fixed and positive standard of seaworthiness, i.e., that the term is relative. Chief Justice Taft, speaking for the Court, held in *Compania de Navegacion* v. *Fireman's Fund (The WASH GRAY),* supra, 277 U.S. at 80, a case very similar to ours but preceding *Wilburn Boat,* that the implied warranty of seaworthiness has to accommodate what is "reasonably practicable in a particular case", i.e., no more is required than that her owner exercise due diligence before she leaves port to make her as seaworthy "as reasonably practicable". (See 9 COUCH ON INSURANCE 2d, § 37B:357, p. 271 and 1 ARNOULD'S LAW OF MARINE INSURANCE AND AVERAGE [16th ed.] §§ 110-111.) This Court, in *The WASH GRAY,* likewise held that "perils of the sea" coverage is also relative, as, for a vessel of *The WASH GRAY's* description (an inland tug being towed), winds of 25 mph, with occasional gusts, and waves of 4-5 ft., would constitute a covered peril. Justice Taft noted in *The WASH GRAY* that not every type of vessel can be put into that condition of seaworthiness requisite for the contemplated voyage, giving as an example a river boat to be sailed from this country to Calcutta or Odessa. Accordingly, even under §§ 33(3) and 39(1) of the English Marine Insurance Act of 1906 (MIA) (App. F), imposing, at commencement of the voyage, an absolute implied warranty of seaworthiness in voyage policies (but only a duty of due diligence if the policy is time), would not deny coverage in our case, even if, instead of State law under *Wilburn Boat,* English marine insurance law was applied as part of Federal

admiralty law on marine insurance. Chief Justice Taft added that "the underwriter must be informed of the peculiar nature of the risk", i.e., it must be provided with "full information as to the class of vessel and the intended voyage". If the underwriter has this knowledge, then, according to *The WASH GRAY*, should the insured vessel founder even though due diligence was exercised to make it ready for sea, the casualty will be ascribed to a peril of the sea rather than to the vessel's unseaworthiness. Likewise here, Pacmar had full knowledge of the type of vessel involved, where it was stored and the intended voyage. (Poysky believed he had also sent Parks, the broker, a copy of the bid brochure. [RT 146:4-19].) Pacmar extended coverage nevertheless, and the decision below as to the implied warranty of seaworthiness and perils of the sea is totally erroneous and contrary to this Court's decisions. Unless it is corrected by this Court, the decision will henceforth serve only to befuddle insured owners, practitioners and the Courts alike, to the great disadvantage of the owners. See further *Klein* v. *Globe & Rutgers Fire Ins. (The TORNADO)*, 2 F.2d 137 (3d Cir. 1924), *Spooner* v. *Conn. Fire Ins. Co.*, 314 F.2d 753, 756 (2d Cir. 1963), *Russell Mining Co.* v. *Northwestern Fire & Marine Ins. Co.*, 207 F.Supp. 162, 166 (ED Tenn. 1967) and *The XANTHO*, 12 App. Cas. 503, 509 (1887).

Another aspect of this case is that it represents an attempt, through the defendants' attorneys, who, in the main, crafted the FF/CL (not to be unfair, we should say that we also proposed FF/CL pursuant to the District Court's request of all parties), to breathe life into the so-called "American Rule" and create precedent for its future use. According to the "American Rule", there is an implied warranty of seaworthiness imposed if a time policy incepts while the vessel is in port. As Gilmore & Black, THE LAW OF ADMIRALTY (2d ed.) state at pp. 63-67, that "rule" has so far been entirely based on dicta. "No case has been found squarely basing decision on the so-called 'American Rule', and the guess is ventured that the Supreme Court, if the issue was even [ever?] tendered it, will not uphold this warranty." *Id.*,

p. 65. See also Parks, THE LAW OF TUG, TOW AND PILOTAGE (2d ed.) 548-560.

Even under the "American Rule", if the port the vessel is in when the time policy commences is one without adequate repair facilities, there can be no implied warranty of seaworthiness. *The NATALIE,* 1959 AMC 2379 (NY ARB). See discussion concerning this important arbitration case and criticizing the "American Rule" in Buglass, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES (2d ed.) pp. 36-7.

There are reasons why an implied warranty of seaworthiness is imposed in a voyage policy. The vessel is in port, about to leave on a voyage and the owner usually knows or has the means of knowing the condition of the ship in relation to the rigors of the voyage ahead, but under a time policy, when the policy expires and has to be renewed, the vessel may be at sea or in a port other than its home port and which may not have adequate repair facilities. Hence its owner will not have such knowledge or means of acquiring it. For further explanation, see *Sorenson & Neilson* v. *Boston Ins. Co.,* 10 F.2d 563, 565-7 (D. Md 1925). YCV-9 being in Honolulu, which was not her home port and which is without a civilian drydock large enough to handle it, then, according to *The NATALIE,* supra, *Sorenson & Neilson* and the cases cited at p. 565, there can be no implied warranty of seaworthiness in the time policy.

We ascribe the above-mentioned intent to opposing counsel because of the stated refusal in the FF/CL to decide whether the policy they call a voyage policy several times (FF 25, 26, 28) is a voyage or a time policy. (CL 21.) But even if the endorsement covering the barges was time rather than voyage, because it was part of a time policy and expressly incorporated the time policy's express and implied terms, including warranties, and/or because the coverage of the barges could be and was asked to be extended (i.e., "held covered") for longer than the voyage, the above cases show that the "American Rule" could only be implemented if the vessel was in its home port. *See also Henjes* v. *Aetna,* 132

F.2d 715, 719 (2d Cir. 1943). Under the "home port rule", a vessel owner should not be made to suffer a forfeiture of coverage when the port in which the vessel lies does not provide facilities so that an adequate inspection to evaluate the vessel's condition can be made. Hence, it is immaterial whether you call it due diligence under the English rule (where there is no implied warranty of seaworthiness in a time policy [§§ 33(5)], MIA, App. F) or an exception to an implied warranty under the so-called "American Rule". It could only make sense if this same exception applied to a voyage policy as well.

While the foregoing discussion is necessary to understanding the District Court's erroneous holdings, this Court's decision in *Wilburn Boat,* supra, makes it academic. In *Wilburn Boat,* this Court reversed the two lower courts' holdings that the express warranties in the hull policy were "absolute", determined that there was no "federal admiralty rule" requiring literal compliance with warranties and held that, on remand, State law would have to be applied as to the effect to be given the warranties in the policy at hand. (Justice Reed dissented, noting that all prior decisions showed the necessity of a uniform rule in marine insurance cases and that American marine insurance law should be kept in harmony with Great Britain's.[2]) The District Court in our case, however, turned to what it erroneously considered (without citation) to be Federal law in regard "the existence of an implied warranty of seaworthiness in maritime hull insurance policies" which voids the policy on breach (CL 19, 20), rather than to a Hawaii Statute (HRS § 431-419) by analogy and as amplified by Hawaii decisional law, which forbids voiding the policy on breach of warranties. *Avemco Ins. Co.* v. *Chung,* 388 F.Supp. 142 (D. HI

[2] This court has several times stated that respect should be paid to "established doctrines of English Maritime Law", particularly in the marine insurance field. *Queen Ins. Co.* v. *Globe & Rutgers Fire Ins. Co.,* 262 U.S. 487, 1924 AMC 107 (1924), *Standard Oil of N. J.* v. *U.S.,* 340 U.S. 54, 1950 AMC 365 (1950), *CalMar SS Co.* v. *Scott,* 345 U.S. 427, 1953 AMC 952 (1953). See also Schoenbaum, ADMIRALTY AND MARITIME LAW (1987) at p. 561.)

1975). (CL 30.) Hawaii is, of course, the State with the greatest interest in the coverage issues, it being from where the insurance was placed (FF 23-24), the subject of the insurance (the barges) were there, the tow commenced from there, Dillingham (required by the towage agreement to be made an additional insured) is a Hawaii corporation and Dillingham, in the towage contract, also required that suit be brought there. (*See* Art. 17-7, App. D. *See also,* as to choice of law, *Healy Tibbitts Constr. Co.* v. *Foremost Ins. Co.,* 482 F.Supp. 830, 835 [ND Cal. 1979], *Ahmed* v. *Amer. SS Owners Mut. P&I Assoc.*, 444 F.Supp. 569 [ND Calif. 1978] aff'd 640 F.2d 993 [9th Cir. 1981].) That the District Court found that Oregon had the "most significant interest in regulating [the] agency relationship" between Poysky and Parks (CL 16) had nothing to do with applying Hawaii law as to the effect to be given a warranty in a marine insurance policy.

The District Court's holding in this regard, we respectfully submit, exemplifies the "state of turmoil" in which the law of marine insurance has found itself, according to the commentators, since *Wilburn Boat.* Parks, THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE, p. 13. Gilmore & Black, THE LAW OF ADMIRALTY (2d Ed.) at p. 69, characterize the majority's decision in *Wilburn Boat* as "nightmarish" and, at p. 68, state that the case as applied is "persistently problematic". See also p. 71 n. 78a. In fact, these authors, at pp. 70-71, state that they must proceed in their text on the basis of pre-*Wilburn Boat* cases, inasmuch as

> "It is utterly impossible to be at all sure, even yet, how the Supreme Court will at last resolve these perplexities and contradictions [referring to the preceding discussion in their text as to all the myriad possibilities under *Wilburn*].
>
> * * *
>
> The reader is sufficiently warned, however, of the incertitudes that case has introduced. The lower federal courts cannot authoritatively resolve those uncertainties; we will

not know what *Wilburn Boat* means unless and until the Supreme Court clarifies the position further."

It is time, we respectfully suggest, for a clarification of the situation. And if State statutes and regulations, plus judicial decisions amplifying them, are not to govern the application of warranties, then a new Federal admiralty rule implementing the views of the Court as set out in *Wilburn Boat* should be created. This Court showed it does not favor absolute warranties, stating in *Wilburn Boat* (348 U.S. at 319-320, 75 S.Ct. at 373-374),

> "In this very case, should we attempt to fashion an admiralty rule governing policy provisions, we would at once be faced with the difficulty of determining what should be the consequences of breaches. We could adopt the old common-law doctrine of forfeiting all right of recovery in the absence of strict and literal performance of warranties, but this is a harsh rule. Most States, deeming the old rule a breeder of wrong and injustice, have abandoned it in whole or in part."

Actually, there should have been no reliance below on any warranty, much less an implied one, inasmuch as the Samoan Maritime time policy, expressly incorporated by the endorsement bringing the barges into the policy, states: "11. Held covered in the event of any breach of warranty, or deviation from the conditions of this Policy, at an equitable premium to be arranged, notice to be given on receipt of advices." (App. E.) The District Court, obviously relying on an old English case but not citing it, *Greenock SS Co.* v. *Maritime Ins. Co.*, 1 K.B. 367 (1903), where the unseaworthiness (lack of sufficient fuel aboard on departure to complete the voyage) was known to the owner, could have been prevented and certainly had to result in the loss (none of which conditions existed in our case [see Gilmore & Black, supra, at pp. 65-66]), concluded that Clause 11 is inapplicable because, "It is absurd to suggest that an insurer would consider charging an 'equitable premium' for the unseaworthiness present in this case, when such a premium would at least equal the face value of the coverage". The

other side of the coin is that only minor breaches of warranty are excused under Clause 11, a distinction not set out in the policy or found in the cases (which predominate in the Ninth Circuit: *Kalmbach* v. *Ins. Co. of Penn*, 529 F.2d 552, 555-557 [9th Cir. 1976] and *Campbell* v. *Hartford*, 533 F.2d 496, 497-8 [9th Cir. 1976]). *Kalmbach* holds that Clause 11 covers all warranties, express or implied, even as to seaworthiness, and regardless as to whether the breach is a major or minor one. The decision below, by rewriting Clause 11, made the insured his own insurer by means of a judicially-imposed *in*equitable premium adjustment. The courts of the land nowadays do a certain amount of policy rewriting but only to *effect* coverage where such carries out the insured's reasonable expectations as to coverage (see *Kalmbach*, supra, also Keeton, "Insurance Rights at Variance with Policy Provisions", Vol. 83 Harv. L.R. [March 1970] at p. 968) — and the insured could never, obviously, expect to forfeit coverage through a condition precedent which is implied and not expressed and which is clearly contrary to Clause 11, the "Held Covered" Clause.

Further in this regard, Pacmar failed to demand *any* "equitable premium" of Poysky or Samoan Maritime, which constitutes a waiver. See *Luria Bros.* v. *Alliance Assur.*, 780 F.2d 1082, 1986 AMC 1539, 1549-1551 (2d Cir. 1986), *The ANTHONY D. NICHOLS*, 49 F.2d 927 (SDNY 1931), 16 C. Appleman, INSURANCE LAW OF PRACTICE, § 9260 at p. 393 (1981). (And Pacmar also failed to return or tender the premium with its denial of the claim on the ground that the policy was void. [RT 1665:19, App. H. CL 32.] Under Hawaii law, this defeats any attempt at rescission of the policy. *USF&G* v. *Leong Dung Dye*, 52 F.2d 567, 570-1 [9th Cir. 1931]. Hawaii law would govern interpretation of the policy. *Ahmed*, supra, 444 F.Supp at 571, *Healy Tibbitts*, supra, 482 F.Supp. at 835.)

There is yet another express provision of the policy, the "Additional Perils" or *Inchmaree* Clause, which negates the existence of an implied warranty of seaworthiness as to the additional perils set out. *Tropical Marine Prod.* v. *Birmingham Fire Ins. Co.*, 247 F.2d 116, 123 (5th Cir. 1957)

cert. den. 355 U.S. 903 (1957), *The SPOT PACK*, 242 F.2d 385, 392 (5th Cir. 1957). *Eggers* v. *Nat'l Union Fire Ins. Co. (Texas No. 1)* 112 F.2d 541 (5th Cir. 1940). That clause covers "cost of repairs or loss or damage to the subject matter insured directly caused by . . . any latent defect in the machinery or hull; . . . or from other causes of whatsoever nature . . . howsoever, causing loss of or injury to the property hereby insured provided such loss or damage has not resulted from want of due diligence by the Assured . . ." (See App. E.)

As Buglass, supra, pp. 64-5, and ARNOULD, supra, at § 826 ("The general intent of the clause is to extend the cover, in specified cases, to risk of damage to hull or machinery which cannot be said to be the direct consequence of a marine peril."), state and as pointed out by such cases as *Tropical Marine*, supra, 247 F.2d at 118-9, the covered perils were greatly extended by the "Additional Perils," or *Inchmaree* Clause. The clause in our policy is even a broadened version of that clause, as a comparison of the clause on p. 65 of Buglass with ours shows.[3] For one, the parenthetical phrase "(excluding the cost and expense of replacing or repairing the defective part)" qualifying the additional peril of a "latent defect in the machinery or hull" has been omitted.

While Buglass's opinion is that the "directly caused by" language limits recovery for "bursting of boilers, breakage of shafts" and latent defects to consequential damage only (Buglass, supra, p. 127), he does not discuss what happens when the particular version of the *Inchmaree* clause involved omits "(excluding the cost and expense of replacing the defective part)", though it does contain "directly caused by". While the reasonable expectations of the insured are

[3] Even the original Perils Clause in the policy ("TOUCHING the Adventures and Perils . . .") is an "all risk clause" requiring the insured only to prove "that the loss was due to a casualty and was caused by some event . . . covered by the general expressions of the policy. 'He is not bound to go further, and prove the exact nature of the accident or casualty whichever first occasioned his loss' ". *Mellon* v. *Fed. Ins. Co.*, 14 F.2d 997, 1002 (SDNY 1926).

obviously affected by such a change to his advantage, *Tropical Marine* allowed full recovery of the vessel's insured value when the latent defect (deteriorated bottom in a wooden boat first discovered at sea) resulted in a total loss, even though the *Inchmaree* clause there contained the parenthetical clause discussed above. The Fifth Circuit pointed out in *Tropical Marine* as follows: that a latent defect is a condition that is not known or discoverable by the owner or one in privity with him, that the defect is obviously latent where it manifests itself, as by a hull which starts to leak 3½ days after departing port (read 8 days in our case), and that, alternatively, the loss is a casualty due to peril of the seas if the sinking results from the action of the sea on an unseaworthy hull.

That *Tropical Marine* involved a time policy is not a valid distinction in view of the District Court's refusal to conclude finally whether the policy in our case was time or voyage. (CL 21.)But even if a voyage policy is what is involved in our case, Vol. 2 ARNOULD, supra, § 829, states:

> "The cover in respect of 'latent defect' would be virtually meaningless if this were not to be construed as applying even in cases of inherent vice. Where this part of the [*Inchmaree*] clause applies, therefore, a defense of inherent vice is not open to underwriters. Similarly, the latent defect cover must, it is submitted, be regarded as overriding the implied warranty of seaworthiness in voyage policies, to the extent that there is a conflict between the implied warranty and this head of cover. The point has not been decided in this country, but the majority of the American cases proceed on the basis that unseaworthiness is no answer to a claim in respect of 'latent defect.' "

See also 2 ARNOULD § 710, stating:

> "It is submitted that in so far as unseaworthiness is covered by this [*Inchmaree*] clause, the express coverage must prevail over the implied warranty and that an underwriter cannot therefore rely on a latent defect as a breach of the warranty of seaworthiness in a policy incorporating the Institute Voyage Clauses."

It is hoped that the Court will consider the need to clarify and settle at the highest level these issues implicit in every damage claim, total loss or not, under a hull policy.

Finally, there is the question as to what is "ordinary wear and tear" and whether it precludes, as the District Court concluded (CL 26, 27), application of a covered peril. Buglass, supra, pp. 83-4, discusses this very issue, concluding that, while the underwriter is not liable for wear and tear from ordinary causes, it is liable where the effect of the risks insured on the vessel (e.g., heavy weather) are enhanced by this condition. "This is sometimes called the 'death blow' theory but it is really a question of proximate cause; the question to be asked is 'would this damage have occurred but for the operation of an insured peril?' " (See FF 45 and CL 10, inseparably linking unseaworthiness and heavy weather to rule out delay charges. This is inconsistent with ascribing all damage to unseaworthiness.) See also *Yacht DUET*, 1967 AMC 1144 (D.Oreg. 1967), *Moran Towing* v. *M.A. Garmino Constr. Co.*, 363 F.2d 108 (1st Cir. 1966), *Redna Marine* v. *Poland*, 46 FRD 81, 87 (SDNY 1969) and *Frangos* v. *Sun Ins. Co.*, L.L.R., Vol. 49, p. 354.

**(b) The Law Applying a Warranty of Workmanlike Service to the Professional Tower Does Not Require Proof of the Tower's Negligence and, Where Such a Tower Has Complete Control of the Towed Vessel, as Where It is Unmanned, It Should be Strictly Liable Where Damage or Loss is Incurred by the Tow that was Avoidable.**

Turning to the subject of the implied warranty of workmanlike service in the performance of a towage agreement, the existence of such a warranty was noted in and followed in Second Circuit cases since *The Soerstad*, 257 F. 130, 131 (SDNY 1919). *See also James McWilliams Blue Line, Inc.* v. *Esso Standard Oil Co.*, 245 F.2d 84, 1957 AMC 1213 (2d Cir. 1957), *Fairmont Shipping Corp.* v. *Chevron Int'l Oil Co.*, 511 F.2d 1252 (2d Cir. 1975), *cert.den.* 423 U.S. 838 (1975), *Dunbar, Admx.* v. *H. Dubois Sons*, 275 F.2d 304, 1960 AMC 1393 (2d Cir. 1960), *Gaymon* v. *Prud. Lines*, 473 F.Supp. 161, 164 (SDNY 1919) and *Gwynedd*

*Corp.* v. *Chilula, U.S.A.* 1979 AMC 531, 542-3 (SDNY 1978) (N.O.R.). *See further Tebbs* v. *Baker-Whitely Tow. Co.*, 407 F.2d 1055 (4th Cir. 1969), *Dillingham Tug & Barge Corp.* v. *Collier Carbon & Chemical Corp.*, 707 F.2d 1086, 1091 (9th Cir. 1983), *cert.den.* 465 U.S. 1025, 104 S.Ct. 1280 (1984), *U.S.* v. *Tug MANZANILLO*, 310 F.2d 220 (9th Cir. 1962). (*To the contrary, see Hercules Inc.* v. *Stevens Shipping Co.*, 698 F.2d 726, n. 25 at 737 [5th Cir. 1983].) As *Fairmont Shipping* points out, this warranty is related to that created by this Court in *Ryan Stevedore Co.* v. *Pan-Atl. SS Corp.*, 350 U.S. 124, 76 S.Ct. 232 (1956) but is not limited to cases where indemnity is sought as to liability to third parties. (See *Fairmont*, supra, 511 F.2d at 1259-1260.)

The warranty is the answer to the problem faced by every owner of an unmanned barge, whose last sight of his vessel may well be that of its stern rake as it submissively trails after the tug on its way to sea. As stated in *Fairmont*, 511 F.2d at 1255-8, 1260-1, and in *Tebbs*, supra, 407 F.2d at 1058, the warranty is imposed because the warrantor is in the best position to adopt measures to prevent accidents and must do so if it can or be cast in damages, regardless of the tow's seaworthiness or whether the tower merely brought a pre-existing unseaworthy condition into play. (This is nothing new, as the following negligence cases show: *Chemical Transporter, Inc.* v. *M. Turecamo, Inc.*, 290 F.2d 496, 497 [2d Cir. 1961], *Sternberg Dredging* v. *Moran Towing*, 196 F.2d 1002, 1005-6 [2d Cir. 1953], *South* v. *Moran Towing*, 360 F.2d 1002 [2d Cir. 1966], *Offshore Co.* v. *G&H Offshore Towing*, 262 F.Supp. 282, 287 (SD Tex. 1966) *aff'd.* 403 F.2d 715 (5th Cir. 1968). [This Court has held that circumstances alone may cast a duty of explanation on the tug. *The Steamer WEBB*, 81 U.S. (14 Wall.) 406, 414 (1871). See also *Bd. of Com'rs* v. *FARNSUM*, 574 F.2d 289 (5th Cir. 1978)].) The *extent* of the warranty depends upon the circumstances relating to the degree of control in the tower and on its expertise. *Tebbs* at 1059. If the tower is a professional tower, then the full degree of expertise should be presumed. This is why, under warranty law, that knowledge of the risks that an expert in the field would have is *imputed* to the warrantor

and his only defense is that the warrantee actively hindered his performance. (Under negligence principles, on the other hand, a plaintiff must prove that the defendant acted unreasonably in light of a known or constructively known risk.) (See discussion 3 Amer. Law of Prod. Lia. 3d § 33:5.)

Obviously, in the case of an unmanned barge that runs into trouble at sea, there is nothing that the warrantee can be held to have done to hinder the tower's performance because the warranty requires that the professional tower act to save the barge *regardless* of its pre-existing condition. If the barge could have been saved, according to the opinion testimony of an *independent* expert tug captain, the warranty is breached unless all steps were taken which should have been taken by a professional tower. (See *The ROCONA* v. *Guy F. Atkinson Co.*, 173 F.2d 661, 665 [9th Cir. 1949].) (Note that the District Court accepted only the opinion of MIKIALA II's master as to what he could or should have done.) The Ninth Circuit itself, in an earlier decision, followed this principle, determining that the tug's failure to head for the nearest port "when it became obvious that the barge was in trouble" was, on its face, a breach of warranty, even though the barge was unseaworthy to begin with. *Dillingham* v. *Collier*, supra, 707 F.2d at 1091 and n. 3.[4]

[4] To the same effect even if the cause of action is based on negligence: *McDonough Marine Serv.* v. *M/V ROYAL STREET*, 465 F.Supp. 928, 935 (ED La. 1979), a case where plaintiff tow owner proceeded on the basis of the tug's negligence and tug defended, claiming the tow was unseaworthy. The District Court stated:

> "... The (tug) was negligent in failing to take reasonable steps to determine the exact condition of the tow and to correct the problem ... Instead, the tow proceeded on while the bow of the barge continued to lose its remaining freeboard and sink further. While the towing vessel is not liable for a loss occasioned by the unseaworthiness of the tow, *if it continues to proceed when the unseaworthiness of the tow is disclosed or apparent, it is negligent.* (Cite.) *Allowing the barge to become so full of water that it is down by the bow was also negligence.* (Cites.) *This is especially true in light of the available alternatives ...*" (Emphasis added.)

Additionally, see *Pillsbury* v. *Delta B&R*, 1979 AMC 1221, 1233 (ED La. 1978), where tug passed up chances to beach the sinking barge. *Held:* Tower is liable for negligence. "The duty of a tug includes the obligation to

*(footnote continued on next page)*

It is possible under warranty law for the warrantor to be held to be strictly liable if the unmanned barge comes to grief and the circumstances show that there were reasonable alternatives that an expert tower would have implemented but the particular tug crew involved failed to take. (Note that FF 39 did not set out what the "several options" were, according to independent expert Capt. De La Hunt. *See* RT 1567:18-1568:19, 1581:2-14.) Strict liability under warranty law is not unusual in admiralty, e.g., the shipowner's duty to its crewmembers under its warranty to provide a seaworthy vessel (*Seas Shipping Co.* v. *Sieraki*, 328 U.S. 85, 66 S.Ct. 872 [1946] and *The OSCEOLA*, 189 U.S. 158, 23 S.Ct. 483 [1903]) and the manufacturer's warranty as to the safety of his product. *Fairmont*, at 1256, citing *Ryan Stevedoring*, 350 U.S. at 133-4, 76 S.Ct. at 237. See also *East River SS Corp.* v. *Transamerica Delaval*, —U.S.—, 106 S.Ct. 2295 (1986), *Italia Soc.* v. *Oregon Stev. Co.*, 376 U.S. 315, 318, 84 S.Ct. 748 (1964), Prosser, LAW OF TORTS (5th Ed.) § 98 pp. 692-4.

While the District Court adverted to the existence of the warranty (CL 6) (which the Circuit Court referred to as the "so-called implied warranty of workmanlike service"), the District Court went on to state that, "Nevertheless . . . plaintiffs must prove negligence by the tow (sic) to recover for any loss." The District Court's authority for this position, *King Fisher Marine* v. *NP SUNBONNET*, 724 F.2d 1181 (5th Cir. 1984) and *Stevens* v. *The WHITE CITY*, 285 U.S. 195, 202 (1932), never held such in regard to this implied warranty; they are negligence cases. (In *Stevens*, "The tug [did] not have exclusive control over the tow" and the cause of the damage was known. 285 U.S. at 200. As for *Stevens*' language concerning bailment, it should be noted that in the *later* case of *Bisso* v. *Inland Waterways*, supra, 349 U.S. at 90-91, this Court points out that release from negligence clauses are thrown out in bailor-bailee situations, which the Court then proceeded to do with the tug's release from

---

*(footnote continued from preceding page)*

take such measures as are reasonably available to it to avert further damage once it is evident that the tow is in peril."

negligence clause in that particular case. Further, the law of this Court is to the contrary, it stating in *Italia Soc.* v. *Oregon Stev. Co.*, supra, 376 U.S. at 323-4, 84 S.Ct. at 748, that the warranty of workmanlike performance "... may be breached by non-negligent as well as by negligent conduct." See also *Crumady* v. *The J.H. FISSER*, 358 U.S. 423, 428-9, 79 S.Ct. 445, 448 (1958). The District Court thus erred as a matter of law in not considering that the tower's only defense to a breach of warranty action was the active hindrance of the tow. See *Fairmont*, supra, 511 F.2d at 1260-1. Not even having raised this defense, it was waived. Even if it had not been waived, Dillingham could not have proved it, because YCV-9, while deterioration in its bottom was found by the District Court, this condition was no hindrance to the tug's performance of the tow for the first eight days of the voyage, as the FF/CL show. It would have not been a hindrance later if YCV-9 had been returned to port to reconstitute the bridle or the simple precautions Capt. De La Hunt advised had been taken.

**(c) The District Court interpreted the representation of the Tow's Owner that the Tow shall be seaworthy and ready for sea as equivalent to the absolute warranty of seaworthiness, a violation of the rule of Bisso.**

Article 4 of the towage agreement prepared by Dillingham (FF 14) is to the effect that the tow's owner "warrants and represents that the Tow, at the time it is tendered to the Tug for towage (i) shall be seaworthy and in all respects ready for and capable of making the specified voyage, ..." (FF. 16.) CL 4 is that Dillingham was entitled to rely on this "representation of seaworthiness" and "was under no duty to make a detailed inspection of [YCV-9's] seaworthiness *either before or during the voyage*" (emphasis added) (which ignores FF 21 to the effect that there were no grounds for reliance on the representation, since Dillingham's port captain, Kapele, had actually "ascertained that all recommended towing arrangements were in place, and supervised the hook-up"). CL 5 concludes that YCV-9's pre-existing unseaworthiness is a breach of Article 4.

Since the District Court failed to consider Poysky's lack of knowledge as to the barge's actual condition and his employing Capt. Dickieson to make YCV-9 ready for sea, and since it holds that the tug, without any inspection, may, without more, merely hook-up and depart and continue to tow without regard to a port of refuge nearby and the barge's worsening condition, the decision in effect imposes another absolute warranty (which is what the Circuit Court even said it was) achieving indirectly what the exculpatory clause as to negligence of the tow failed to do in *Bisso*. (Note the incorrect quote from *Dillingham* in CL 7, tellingly omitting the "character of the tow" from what the tug must consider.) *See also Boston Metals Co.*, v. *SS WINDING GULF*, 349 U.S. 122 (1955) (tower tried to make the tug's crew employees of the tow) *Dixilyn Drilling Corp.* v. *Crescent Towing & Salvage Co.*, 372 U.S. 697, 698, 83 S.Ct. 967, 968 (1963), on remand 324 F.2d 272 (5th Cir. 1963), op.set aside on rehearing 329 F.3d 754 (5th Cir. 1964) (towage agreement attempted to require tow to indemnify tug for any damage claims by third parties) *Hercules, Inc.* v. *Stevens Shipping Co.*, supra, 698 F.2d at 738-9 (incorporating COGSA defenses in towage agreement failed) and *Fluor Western, Inc.* v. *G&H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971) (clause in towing contract upheld requiring owner of cargo on tow to fully insure with waiver of subrogation, reason for upholding being that right to proceed against tower would still be available if insurer did not pay the claim). *Twenty Grand Offshore, Inc.* v. *West India Carriers*, 492 F.2d 679 (5th Cir. 1974) (same as *Fluor*), *Dillingham Tug & Barge Corp.* v. *Collier*, supra, 707 F.3d at 1089-1090 (same as *Fluor*) and *PPG Industries* v. *Ashland Oil Co.*, 592 F.2d 138 (3d Cir. 1978) (on rehearing, following *Fluor*).

Sohoenbaum, ADMIRALTY & MARITIME LAW (1987) states, at 425, that there is "An unsettled question [as to] the extent to which *Bisso* forbids clauses limiting liability for damages". The above cases, however, show the limits drawn on the tug industry's resourcefullness in attempting to get around *Bisso*. The absolute "representation" is the newest example and should be vitiated, leaving the tower with no

more than what the usual representation requires. As stated in Gilmore & Black, supra, at p. 63 n. 51, "[A] representation need only be substantially true." To same effect, 41 Tulane L. Rev. 245, 250 and Parks, THE LAW OF TUG, TOW AND PILOTAGE (2d ed.) p. 538 (A representation may "be equitably and substantially answered; . . ."). The rule is the same whether the contract be an insurance policy or a towage contract. *See Morrison Grain Co.* v. *Utica Mut. Ins. Co.*, 632 F.2d 424, 428 n.4 (5th Cir. 1980).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MEADOWS, SMITH & BROWN

JOHN F. MEADOWS

John F. Meadows
*Attorneys for Petitioners*

## APPENDICES


A. Order and Judgment of the Court of Appeals
B. Order Denying Petition for Rehearing and Suggestion for Rehearing *En Banc*
C. Findings of Fact and Conclusions of Law, Order for Judgment
D. Lump Sum Towage Agreement
E. Pacmar Hull Policy (Time) and Endorsement 2 Thereto
F. Hawaii Rev. Stats. 431-419 Marine Insurance Act of 1906
G. Pacmar's Letter Denying Claim
H. Reporter's Transcript Excerpts

**APPENDIX A**
NOT FOR PUBLICATION

# United States Court of Appeals
FOR THE
NINTH CIRCUIT

GEORGE POYSKY, dba
ALASKA TOWING CO., and
SAMOAN MARITIME, LTD.,
a corporation,
*Plaintiffs-Appellants,*

v.

PACIFIC MARINE
INSURANCE COMPANY, a
corporation, and
DILLINGHAM TUG &
BARGE CORPORATION,
*in rem,*
*Defendants and Appellees.*

**NO. 85-2949**
**D.C. NO. 82-0731 HMF**
**ORDER***

BEFORE: POOLE, NORRIS, AND BRUNETTI, CIRCUIT JUDGES.

The district court found that plaintiffs failed to establish negligence or any improper performance in connection with the towing operation; that the constructive total loss was not due to abnormal stresses on the YCV-9 barge during towing but was caused by substantial wastage to the wind and water line, a condition which pre-existed the voyage and was itself a breach of plaintiffs' own warranty for seaworthiness. The district court further found that any slamming damage sustained by YCV-9 from the tug, from the other barge on tandem tow, and any pounding damage from the seas, were not sufficient to have caused the loss. These findings are not clearly erroneous.

The district court further concluded that the so-called implied warranty of workmanlike service did not subject the

* This order is not appropriate for publication and may not be cited to or by the courts of the circuit except as provided by 9th Cir. R. 21.

tug to absolute liability; that the burden of proof was not shifted to the defendants because of a "duty of explanation" and that plaintiffs were required to, but did not, prove negligent performance. These conclusions proximately flowed from the court's extensive findings of fact which were supported by a preponderance of the evidence.

The judgment in favor of defendants and against plaintiffs is AFFIRMED. Defendants are entitled to their costs on appeal.

[File-stamped May 1, 1987]

# United States Court of Appeals
FOR THE
NINTH CIRCUIT

GEORGE POYSKY, dba
ALASKA TOWING CO., and
SAMOAN MARITIME, LTD.,
a corporation,
*Plaintiffs-Appellants,*

v.

PACIFIC MARINE
INSURANCE COMPANY, a
corporation, and
DILLINGHAM TUG &
BARGE CORPORATION, *in*
*personam,* and
TUG MIKIALA II, *in rem,*
*Defendants and Appellees.*

**NO. 85-2949**
**D.C. NO. 82-0731 HMF**
**ORDER**

APPEAL from the United States District Court for the _____ District of Hawaii (Honolulu) _____.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the _____ District of Hawaii (Honolulu) _____ and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is affirmed.

COSTS TAXED

Filed and entered May 01, 1987

[File-Stamped October 19, 1987]

## APPENDIX B

IN THE

# United States Court of Appeals

FOR THE

NINTH CIRCUIT

GEORGE POYSKY, doing business as ALASKA TOWING CO., and SAMOAN MARITIME, LTD., a corporation,
*Plaintiffs-Appellants,*
v.
PACIFIC MARINE INSURANCE CO., a corporation, and DILLINGHAM TUG & BARGE CORP., *in personam*, and TUG MIKIALA II, *in rem*,
*Defendants-Appellees.*

**No. 85-2949**
**D.C. No. 82-0731 H-F**
**ORDER**

BEFORE: POOLE, NORRIS, AND BRUNETTI, CIRCUIT JUDGES

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, this petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[File-Stamped October 7, 1987]

## APPENDIX C

IN THE

## United States District Court

FOR THE

DISTRICT OF HAWAII

| | |
|---|---|
| GEORGE POYSKY, dba ALASKA TOWING COMPANY, and SAMOAN MARITIME, LTD., a corporation, *Plaintiffs,* vs. PACIFIC MARINE INSURANCE COMPANY, a corporation, and DILLINGHAM TUG & BARGE CORPORATION, *in personam* and TUG MIKIALA II, *in rem,* *Defendants.* | CIVIL NO. 82-0731 IN ADMIRALTY |

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for trial before the Honorable Harold M. Fong, and the court having reviewed the proposed findings of fact and conclusions of law and being otherwise advised of the premises herein, finds as follows:

### FINDINGS OF FACT

1. Plaintiff George Poysky, Jr. (hereinafter "Mr. Poysky"), dba Alaska Towing Company, is a resident of the State of Oregon and maintains offices in Seattle, Washington. Plaintiff Samoan Maritime Ltd., is a Washington corporation wholly owned by Mr. Poysky.

2. Defendant Pacific Marine Insurance Company (hereinafter "Pacific Marine") is an Alaska corporation with its principal place of business in Seattle, Washington.

3. Defendant Dillingham Tug & Barge Corporation (hereinafter "Dillingham") is a Hawaii corporation with its principal place of business in Honolulu, Hawaii. Defendant Tug

Mikiala II is owned and operated by Dillingham. It is in custody of the court through a letter of undertaking given by Dillingham and accepted by plaintiffs.

4. Mr. Poysky is and has been, at all relevant times, engaged in the maritime industry. He has been involved in the operation of tugs in the Samoan and Alaskan trade. He has bought and sold government vessels on previous occasions.

5. The YCV-9 is a 200-foot long, open-decked, double square-ended steel barge with a raked bow and stern. It has a 65-foot beam and is about 12 feet deep. It is divided into eighteen compartments by two longitudinal bulkheads and four transverse bulkheads. The barge was built in 1944 at the Pearl Harbor Naval Shipyard.

6. The barge was stored for several years in the water at Pearl Harbor and was advertised for sale by the United States Navy as "Lighter, Aircraft Transportation" with the warning: "The hull of the YCV-9 is considered to be in poor condition . . . each bidder is urged to inspect the craft and rely solely on his own inspection." The invitation for bid also stated: "In water-used-poor-condition. Total cost $249,384." (Plaintiffs' Exhibit 8).

7. Mr. Poysky spent three days making a detailed inspection of the YCV-9 and several other vessels prior to bidding for the barge.

8. Mr. Poysky was high bidder on the YCV-9. Plaintiffs purchased an interest in it on June 22, 1982, from the United States Navy's surplus reserve fleet at Pearl Harbor. Other part purchasers included Morton Marine Company, Seattle, Washington, and Max Rouse & Sons, Beverly Hills, California.

9. The barge was surveyed both before and after plaintiffs purchased it by R.W. Dickieson, Inc., Marine Surveying. In the spring of 1982, Captain Dickieson had conducted an in-water survey of the barge for Quigg Brothers McDonald of Aberdeen, Washington, which was considering buying the barge for use as a base for a heavy crawler-type crane. Robert

W. Long, a naval architect for Quigg Brothers, asked Captain Dickieson to have certain audio gauge tests performed on the barge to determine the thickness of the hull. These tests were performed by Richard A. Schnase, an ultrasonic technician for Coastal Marine, Inc., a subsidiary of the Dickieson firm. Only one audio gauge reading was taken of the bottom plating in each compartment (except in compartment 1C where water prevented a reading). No readings were taken on the bottom plating at the turn of the bilge. None of the readings were performed on the sides of the barge at the wind and water line or below. Mr. Long requested the latter readings upon seeing pictures of the barge, but Mr. Schnase had no time to obtain them. Without these readings, Mr. Long concluded that the barge could be safely towed to Seattle and recommended its purchase to Quigg Brothers.

10. Later, Ken Savaloja, representing Coast Marine Construction Company, which was interested in purchasing the barge from Mr. Poysky, requested Captain Dickieson to put his notes from the Quigg Brothers survey into the form of a report. The report, dated June 23, 1982, stated that the barge appeared to be sound, but noted that the bottom was not surveyed because the barge was then afloat. The report warned: "No statement, express or implied, is made concerning the condition of the bottom. This can only be determined by hauling out the barge." Mr. Poysky testified that he never knew of the existence of this report by Captain Dickieson.

11. Mr. Poysky did not ascertain the condition of the hull because there was no suitable drydock available to him in Hawaii.

12. Marine Power & Equipment Co., Seattle, Washington, competed with Mr. Poysky for high bidder on the barge. It sent Lloyd Anderson to inspect the vessel at Pearl Harbor. Mr. Anderson, who did not appear at trial but whose deposition testimony was admitted into evidence, testified that he took six to eight ultrasonic readings per compartment, or a total of between 100 and 200 "shots." He could not produce

any record of his readings. Assuming that the readings were as he remembered, those in the bilge strake portion of the bottom were as low as 0.240 to 0.260 inches. Because he had certain readings elsewhere close to 0.375, Mr. Anderson assumed that this had been the original thickness of the hull. Accepting it as the best available estimate, these readings show wastage in the spots measured of 36.0% and 30.6%, respectively. Both Captain Dickieson and Mr. Schnase testified that, as a general rule, the American Bureau of Shipping requires replacement of plates which are 25% wasted.

13. Mr. Anderson did not see any large holes in the barge, such as would come from collision. He believed from his inspection that the barge was towable. He testified, however, that tropical marine growth, such as barnacles, would eat holes in the bottom plating of any barge, such as the YCV-9, which has lain in tropical waters for a long period of time. Because of marine growth on the underwater portion of such a vessel, he would not consider the condition of its bottom in deciding whether and how to tow it. He testified that there was no way of determining the condition of the bottom plating on such a barge without having it drydocked, and that its buyer would run the risk that extensive repairs would be needed. Mr. Anderson's testimony as to his barge surveying experience shows that he is amply qualified to testify on ultrasonic marine surveying and on the effect of tropical marine growth on the condition of a steel barge hull.

14. Mr. Poysky contacted several tow boat companies, including Sause Brothers, Crowley, and Dillingham, in an attempt to secure a tug to tow the YCV-9 and another barge he had just bought from the naval reserve fleet, the YFNB-6, from Pearl Harbor to Seattle. On September 21, 1982, Rey Jonsson of Dillingham advised that a tandem tow could be arranged for a negotiated price of $75,000. On September 23, 1982, Mr. Poysky appeared at Dillingham's office in Honolulu, where he reviewed in detail the Lump Sum Towage Agreement prepared by Dillingham. He did not question or object to any provision of the agreement.

15. Article 3 of the agreement provided that Dillingham was entitled to charges for delays in transit caused by the fault of the customer.

16. Article 4 provided that Mr. Poysky warranted and represented to Dillingham that the YCV-9 would be seaworthy at the beginning of the voyage and was ready in all respects for tow to Seattle.

17. Article 12 provided that Mr. Poysky obtain insurance for the full value of the YCV-9 during the tow. Mr.Poysky testified that he understood that, for any loss or damage to the YCV-9 which was or would have been covered by hull insurance, he would look solely to that insurance for compensation.

18. Prior to commencement of the voyage, Captain Dickieson was asked to conduct a second survey of the barge to specify the preparations needed to ready the barge for the tow. Although there is some question as to whom Captain Dickieson was working at that time, Captain Dickieson testified that he believed he was working on behalf of Mr. Poysky. He recommended to Mr. Poysky that six tasks be performed to render the barge "ready, in all respects, to be towed to the U.S. mainland." Mr. Poysky engaged Kevin Moore, one of his employees, to carry out all of these recommendations.

19. Mr. Moore constructed the YCV-9 towing bridle, and surge chain or "pigtail" to the bridle, from used Navy stud link anchor chain which he and Mr. Poysky found in a storage locker on the barge YFNB-6. The age and prior use of the chain were unknown. The bridle chain was between one and one-fourth inches and one and five-eighths inches in diameter.

20. Mr. Poysky's employees attached an emergency tow wire to a cleat just aft of the double bitt on the port forward side near the bow in accordance with Captain Dickieson's instructions. This wire was about 200 feet long and one and onefourth inches in diameter. Captain Dickieson testified that the wire was surplus provided by the Navy and that its condition and prior use were unknown.

21. Due to a prior commitment, Captain Dickieson was unable to attend the hook-up of the YCV-9 to the tug Mikiala II. Dillingham port Captain Frank Kapele did attend, ascertained that all recommended towing arrangements were in place, and supervised the hook-up.

22. At the commencement of the tow on September 24, 1982, Mr. Poysky gave no special instructions to Dillingham regarding the tow. Visual inspection of the YCV-9 afloat did not disclose any condition suggesting that the barge was unsound or unfit for tow to Seattle.

23. On or about August 2, 1982, Mr. Poysky telephoned his insurance agent, Douglas D. Parks of Gene Sause & Company, Insurance Brokers, Portland, Oregon, to obtain quotations on insurance for the YCV-9 and YFNB-6 during the tow. Mr. Parks obtained the requested quotations from Stan Ogden of Pacific Marine and relayed the information to Mr. Poysky.

24. On or about September 21, 1982, Mr. Poysky called Gene Sause & Company to request insurance on the YCV-9 for the tow. It is disputed whether Mr. Poysky made the call from Hawaii or Seattle; the court finds credible Mr. Poysky's testimony that he was in Hawaii when he requested the insurance.

25. On September 22, 1982, via telex, Mr. Parks placed, through Pacific Marine, the insurance which Mr. Poysky had requested. This consisted of two forms of coverage for the voyage from Hawaii to Seattle: a protection and indemnity policy, and a hull policy. There was at the time already in effect a time policy for plaintiffs' tug Eva F. placed by Mr. Parks with Pacific Marine. Mr. Poysky did not seek insurance to remain in force after the delivery of the barges at Seattle. He also did not seek or pay for insurance before the commencement of the tow. He desired only a voyage policy because he had a contract for resale of the barges in Seattle.

26. The telex to Pacific Marine and the confirmation telexes to Mr. Poysky and additional assureds Max Rouse & Sons and Dillingham each speak in terms of coverage for the voyage, not coverage for a period of time.

27. Before agreeing to provide coverage, Pacific Marine did not possess the Dickieson survey report of June 23, 1982. Pacific Marine did not possess any other information which could reasonably have led it to question the condition of the hull.

28. The contract of insurance made in September was not reduced to writing until October 6, 1982. Mr. Parks then added the voyage policy for two barges as an endorsement to the existing time policy covering the Eva F. The endorsement stated:

> Insurances hereunder attach . . . for a voyage from Pearl Harbor, Hawaii to Seattle, Washington . . . Insurances hereunder commence with the making of the barges for the trip . . . and continue during the course of the voyage until the "Mikiala II" releases the tow to the Assured at Seattle, Washington or held covered.

29. The YCV-9, in tow of the Mikiala and accompanied by the barge YFNB-6 on a separate tow wire, departed Pearl Harbor on September 24, 1982.

30. When the YCV-9 left Pearl Harbor on September 24, 1982, none of the parties to this action knew the condition of the bottom of the hull.

31. During the first two days of the voyage, the tow experienced rough seas. The YCV-9 appeared to be in good condition during and at the end of this period. It had not taken on so much water during the first two days of the voyage so as to begin to list or sink.

32. On the night of September 26, 1982, two days out of port, the tow wire to the YCV-9 parted.

33. Before the bridle broke, the tug's chief mate, Francis McCummiskey, testified that he had reduced the tug's speed due to increasing wind velocity and wave height. When the bridle parted, the tug was not traveling at an excessive speed for the prevailing conditions.

34. The next morning, the tug maneuvered to pick up the emergency pennant rigged from the port bow of the barge.

After successfully picking up the pennant and attaching a new tow wire, the tug proceeded with the tow to Seattle.

35. Captain Kapele testified that in his 30 years of experience as a tug master it was customary for the tug captain to follow instructions given by the tow's surveyors. When a surveyor attaches an emergency tow wire to the barge, the barge can be safely towed. Whether or not this towing arrangement may be considered "unorthodox," as plaintiffs characterize it, plaintiffs have not sustained their burden of showing that towing the barge from the corner caused its internal scantlings and hull skin to experience stresses which they were not built to withstand, and that this caused the constructive total loss of the barge. Harold Coachman, master of the Mikiala, understood on this voyage that it was proper to tow by the emergency tow wire attached to the side cleat, and he did not have any reason to know or believe that towing the YCV-9 by the emergency wire would subject it to any harm. The weather forecast ahead was favorable and the barge did not appear damaged.

36. Plaintiffs' expert, Thomas R. De La Hunt, testified that it was customary in the towing industry for the marine surveyor to determine the towing arrangements, including how the tow wires were to be secured to the tow. Captain De La Hunt admitted that he had never been told by any marine surveyor that an emergency tow wire was not intended to be used for a long distance tow.

37. Captain Kapele testified that the Navy had established a maximum towing speed of not more than eight knots for the towage of its YCV barges. At no time during the voyage did the tow speed of the YCV-9 exceed eight knots.

38. Captain De La Hunt testified that in his opinion the tug was traveling at an excessive speed when the bridle parted. He could not state, however, what a proper speed would have been. Captain Kapele, Captain Coachman, and Chief Mate McCummiskey testified that they had reviewed the the entire log and had not located any instance of excessive speed. The court has also reviewed the log and finds by a preponderance of the evidence that the Mikiala was not

traveling at an excessive speed when the birdie broke or at any other time during the voyage.

39. Captain De La Hunt testified that when the bridle broke, the tug should have returned to Hawaii with the YCV-9. He also testified, however, that the captain had several options. Regarding the decision to proceed by towing the barge by its emergency tow wire, Captain De La Hunt testified that his main concern would have been whether the emergency wire would break if the tow were continued. The emergency tow wire did not break during the tow of the YCV-9.

40. The court finds by a preponderance of the evidence that the YCV-9 was not subjected to abnormal stresses causing or contributing to the constructive total loss of the barge as a result of being towed by the corner on the emergency tow wire. Raymond Thurston, a marine surveyor who surveyed the barge on drydock in Seattle on October 19, 1982, testified that he saw no evidence of racking, hogging, or sagging stresses. Dennis Morrell, another marine surveyor who surveyed the barge on drydock in Seattle on October 20, 1982, testified similarly. Plaintiffs' expert, Captain De La Hunt, did not view the YCV-9 on drydock and has never viewed the internal members of the barge. He is admittedly unfamiliar with how the barge is built and has never towed a similar barge.

41. On October 2, 1982, the barge was slightly down at the bow. Captain Coachman put a man aboard the barge in an attempt to reconstitute the bridle. During this operation, he noticed a crack in an old weld seam. To relieve pressure from that area, he began to tow the barge from the stern.

42. The next day, the tug came alongside the barge. Two crewmen went aboard the barge to move the emergency tow wire from the bow to the stern. They reconstituted the emergency tow wire to the starboard stern cleat in the same manner and configuration as Captain Dickieson had previously secured the emergency tow wire to the port bow cleat. The tug came alongside the starboard side of the barge. The tug's black rubber fenders were in place and provided a

cushion between the side of the barge and the side of the tug. Captain Coachman, Chief Mate McCummiskey, and crew member Francis C. Young testified that the tug did not strike or hit the barge during this operation. Captain Coachman and Mr. Young testified that if the barge and tug had struck each other with sufficient force to cause any damage to the barge, the fender would leave skid marks on the side of the barge. The photographs in evidence show no such skid marks. Captain Thurston testified that if the tug and barge had collided with each other with sufficient force to damage the barge, the tug would have been damaged as well. There is no evidence of any damage to the tug.

43. After the decision was made to complete the voyage to Seattle on the emergency tow wire, the crew exercised prudent seamanship during the remainder of the voyage.

44. On October 15, 1982, the tug arrived at Shilsole Bay in Puget Sound, Washington, with the barges in tow. The towage time was 21 days. The normal time for a tandem tow is 13 days.

45. The delay in arrival was caused in part by rough weather. How much of the delay was due to weather and how much, if any, to the condition of the barge at the inception of the voyage cannot be determined from the record.

46. The barge's running lights became inoperative during the trip. The Coast Guard would not allow the tug and barge to enter Puget Sound without proper navigation lights. Dillingham incurred assist tug charges of $990.00 for the installation of navigation lights.

47. Dillingham incurred port charges of $72.32 for an agriculture inspection upon arrival.

48. On October 19, 1982, Captain Thurston conducted a survey of the YCV-9 while it was on drydock at Lockheed Shipbuilding Construction Company in Seattle. On October 20, 1982, Mr. Morrell, a surveyor with the Salvage Association, surveyed the barge at the Lockheed shipyard. The cost of the latter survey was $432.00.

49. Mr. Morrell's survey report, the trial testimony of Captain Thurston and Mr. Morrell, and the photographs of the YCV-9 establish that the bottom and side of the barge were substantially wasted to the wind and water line, especially at the turn of the bilge. This wastage preexisted the voyage which began on September 24, 1982.

50. During the voyage, but after the barge had encountered difficulty, Mr. Parks contacted Captain Thurston and asked him to survey the barge when it reached port. Mr. Parks appointed Captain Thurston on behalf of both Mr. Poysky and Pacific Marine, believing that the interests of the insured and the insurer would be identical in a possible adversary relationship to the tug. Captain Thurston believed he was appointed for Pacific Marine.

51. Mr. Poysky was unrepresented by his own surveyor when the barge arrived on October 15, 1982. This was not the fault of Pacific Marine, which did not learn of the loss until October 20, 1982, when it was so advised by telex from Mr Parks. By that time, Mr. Poysky had already retained counsel and the barge was already on the drydock. By the morning of October 21, both Mr, Poysky and his counsel, John Meadows, were aware that Captain Thurston believed he was working for Pacific Marine; Mr. Poysky and Mr. Meadows threatened a bad faith action. This occurred just before the barge came off the drydock and less than a day after Pacific Marine learned of the loss.

52. Captain Thurston testified that he was not consciously biased for or against any party in making his survey. Pacific Marine is one of the larger, but not one of the largest, surveying clients of M.A. Stram Associates, Inc., of which Captain Thurston is part owner. Captain Thurston's brother is vice-president of Foss-Dillingham, a sister company to defendant Dillingham. Captain Thurston testified that they had never discussed this case.

53. Mr. Poysky was represented at the survey by his son and partner, George Poysky, III.

54. During inspection in Seattle, a fracture was found in the barge's hull. If the tug came alongside in rough seas, it

could cause a fracture similar to the one found. There is no evidence of rough seas when the tug came alongside the barge on October 3, 1982. Captain Thurston testified that a tear caused by the tug would be horizontal and not vertical, as was the tear in the barge. Mr. Morrell testified that the fracture could have been caused by a collision but he thought it was unlikely because there was metal missing from the area. There is no testimony that the tug was ever alongside the barge at the fracture site, which was about 93 feet from the bow. Captain Coachman testified that he brought the tow alongside the barge's stern starboard side in changing the emergency tow wire from the bow to the stern. The tug is 91.8 feet long.

55. Damage caused by slamming the barge into heavy seas would be identified by indentations in the hull. Slamming the barge into seas would not cause the loss of the structural members. The metal surrounding the hole in the bow rake was wasted. The plate was missing from the bow rake.

56. The thin edges in areas where the hull plating had fallen out offered no resistance to normal sea conditions. There is no direct evidence that the damage to the bow rake and to the bottom of the barge where metal is missing from the hull was caused by slamming. There is only speculation as to the potential causes.

57. Lockheed and other firms estimated the cost of repairs to make the YCV-9 seaworthy to be far more than the market or insured value of the barge. Therefore, the YCV-9 is a constructive total loss.

58. The court finds by a preponderance of the evidence that the constructive total loss of the barge was caused by severely wasted, deteriorated metal in the bottom and sides of the hull up to the wind and water line. The wastage preexisted the tow's departure from Pearl Harbor. Regardless of whether the barge sustained any slamming damage from the tug or from the other barge on the tandem tow, or any pounding damage from the rough seas, any such damage would not have caused the constructive total loss of the barge.

59. Mr. Poysky was represented by experienced maritime counsel from before the arrival of the tow in Puget Sound. Counsel was vigorously representing plaintiff's rights from the beginning, even to the point of threatening to bring a bad faith claim against Pacific marine less than a day after the latter had learned of the loss.

60. George Poysky, III, plaintiff's son, ordered Lockheed to make temporary repairs to the barge while it was on drydock which would be sufficient to keep the barge afloat until it could be beached. Captain Thurston advised him on what repairs were needed and supervised the work. The cost of these repairs, plus the cost of drydocking, was $16,804.00

61. On November 22, 1982, Pacific Marine declined Mr. Poysky's claim for the insured value of the barge, $225,000, asserting that the assureds breached the absolute warranty of seaworthiness contained in every voyage policy.

62. Pacific Marine conducted a prompt and reasonably sufficient investigation of the matter before it denied the claim. Joseph Copeland, plaintiffs' insurance expert, primarily found fault with the fact that Pacific Marine did not interview Captain Coachman before declining the claim. The reason for declining the claim, however, was that the vessel was unseaworthy at the inception of the voyage due to severe wastage. Thus, there would have been little value to interviewing Captain Coachman. Moreover, Pacific Marine reviewed the vessel's log before it declined the claim.

63. Mr. Copeland also found fault because Pacific Marine did not review the Coast Guard report of vessel casualty. That report, however, shows no information of significance that was not known to the insurer when it denied the claim. Dillingham prepared the report forms primarily from the tug's log.

64. Any of the foregoing findings of fact which are properly conclusions of law shall be considered conclusions of law.

## CONCLUSIONS OF LAW

1. This action is a general maritime action pursuant to Rule 9(h) of the Federal Rules of Civil Procedure.

2. The court has subject matter jurisdiction under 28 U.S.C. 1333 (1982), and venue is properly laid in this district.

3. The tug Mikiala II is not liable for any loss occasioned by the unseaworthiness of the tow.

4. Dillingham was entitled to rely upon the tow owner's representation of seaworthiness of the YCV-9 and was under no duty to make a detailed inspection of its seaworthiness either before or during the voyage. *King Fisher Marine Service, Inc.* v. *NP Sunbonnet*, 724 F.2d 1181, 1183 (5th Cir. 1984); *Nat G. Harrison Overseas Corp.* v. *American Tug Titan*, 516 F.2d 89, 94, *modified on rehearing*, 520 F.2d 1104 (5th Cir. 1975).

5. The YCV-9 was unseaworthy at the inception of the voyage due to extreme wastage in the underwater portion of her hull which preexisted the voyage. This constitutes a breach of Article 4 of the Lump Sum Towage Agreement.

6. Towage contracts contain an implied warranty to perform the required services in a workmanlike manner. *Dillingham Tug & Barge Corp.* v. *Collier Carbon & Chemical Corp.*, 707 F.2d 1086, 1091 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984). Nevertheless, a tug does not act as either bailee or insurer for the tow, and plaintiffs must prove negligence by the tow to recover for any loss. *King Fisher*, 724 F.2d at 1184; *Stevens* v. *The White City*, 285 U.S. 195, 202 (1932).

7. "The degree of care of the tug is measured with reference to the character of the sea and weather." *Dillingham Tug & Barge* v. *Collier Carbon & Chemical Corp.*, 548 F. Supp. 691, 697 (N.D. Cal. 1981), *aff'd in part, rev'd in part*, 707 F.2d 1086 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984). Plaintiffs have failed to sustain their burden of establishing, by a preponderance of the evidence, that the crew of the tug did not exercise reasonable care and maritime skill in

towing the barge at the speed at which it was towed and in the sea and weather conditions prevailing. Further plaintiffs have not established that the tug was negligent in towing by the corners of the barge on the emergency tow line. *King Fisher*, 724 F.2d at 1184; *Agrico Chemical Co.* v. *M/V Ben W. Martin*, 664 F.2d 85, 90 (5th Cir. 1981).

8. Absent proof of negligence by a preponderance of the credible evidence, this court will not second-guess the master's judgment; similarly, the testimony of experts evaluating the master's conduct in hindsight is attributed reduced weight. *Esso Standard Oil S.A.* v. *SS Gasbras Sul*, 387 F.2d 573 (2d Cir. 1968), *cert. denied*, 391 U.S. 914 (1968); *Federal Insurance Co.* v. *SS Royalton*, 328 F.2d 515 (6th Cir. 1964).

9. Article 12.6 of the towage agreement requires the owner "to look solely to the applicable underwriter or to any responsible third party" to recover for any loss. Although contractual limitations on liability for a party's own negligence are disfavored, *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85, 90-92 (1955), Article 12.6 of the towage agreement is valid and enforceable on these facts because there has been no finding of negligence on the part of the party seeking to exculpate itself. *See, e.g., Dillingham Tug*, 707 F.2d at 1089-90; *United States* v. *SS President Van Buren*, 490 F.2d 504, 508-09 (9th Cir. 1973).

10. The delay provisions of Article 3 of the towage agreement are valid and enforceable. Dillingham, however, is not entitled to recover the negotiated price of $8,800 per day for eight days delay or any portion thereof. On the factual record, delay due to heavy weather and delay due to the unseaworthy character of the barge cannot be separated. Dillingham has not carried its burden of proof on the counterclaim of showing that the reduction in speed was due to the unseaworthy condition of the vessel, or of proving facts that would allow this court to allocate the delay, if any, due to unseaworthiness and the delay due to weather conditions.

11. Under Article 7 of the towage agreement, Dillingham is entitled to reimbursement for the additional expenses for tug assist of $990.00, the agricultural inspection of $72.32,

and the Morrell survey cost of $432.00. In sum, Dillingham is entitled to recover $1,494.32 from plaintiffs.

12. Plaintiffs are not entitled to recovery from Dillingham nor from the tug Mikiala II. Dillingham may retain the $75,000 towage fee.

13. Neither plaintiffs nor Dillingham are a "prevailing party" against each other in this action within the meaning of Article 17.7 of the towage agreement. Thus, neither may recover attorneys' fees from the other.

14. Marine insurance brokers are technically agents of the assured, even though they are compensated by commissions deducted from the underwriters' premiums. They act as intermediaries both in placing the risk and in handling claims. *Lien Ho Hsing Steel Enterprise Co., Ltd.* v. *Weihtag*, 738 F.2d 1455, 1458 (9th Cir. 1984).

15. Although it is the custom for marine underwriters to deal with insurance brokers as agents of the assured, a broker's agency status arises neither from statute nor from federal admiralty case law. Thus, the law of the state with the greatest interest in the issue controls. *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955); *Lien Ho Hsing*, 738 F.2d at 1458.

16. Because Mr. Poysky is a resident of Oregon, and because Mr. Poysky requested insurance through the Portland offices of Gene Sause & Company, the state of Oregon has the most significant interest in regulating that agency relationship.

17. Under Oregon law, a broker, as distinguished from an agent, does not represent an insurance company but places insurance with whatever company he can induce to insure the risk. The broker therefore acts as the agent of the insured for the purpose of placing coverage. *Lien Ho Hsing*, 738 F.2d at 1458.

18. Sause was an agent of plaintiffs for purposes of placing the coverage.

19. Federal law governs the interpretation of a policy of marine insurance. Only in the absence of an applicable

federal rule would state law govern. *Bohemia, Inc.* v. *Home Insurance Co.*, 725 F.2d 506, 509-10 (9th Cir. 1984); *Ahmed* v. *American Steamship Mutual Protection & Indemnity Association*, 640 F.2d 993, 996 (9th Cir. 1981).

20. The existence of an implied warranty of seaworthiness in maritime hull insurance policies has long been recognized under federal law. *See e.g., D.J. McDuffie, Inc.* v. *Old Reliable Fire Insurance, Inc.*, 608 F.2d 145 (5th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980); *Gulfstream Cargo Ltd.* v. *Reliance Insurance Co.*, 409 F.2d 974 (5th Cir. 1969).

21. The court need not determine whether the policy here is more properly considered a time policy or a voyage policy. *Compare Gregoire* v. *Underwriters at Lloyds*, 559 F. Supp. 596 (D. Alaska 1982) (discussing the differences between the American and English "rules" regarding time and voyage policies). Regardless of whether the policy is either a time or voyage policy, the constructive loss of the barge was proximately caused by the unseaworthiness of the hull. Because the barge was not reasonably fit for its intended use, plaintiffs' breach of their implied warranty of seaworthiness precludes recovery under the policy.

22. This result is unchanged by the "held covered" clause. That clause provides:

> Held covered in the event of any breach of warranty, or deviation from the conditions of this Policy, at an equitable premium to be arranged, notice to be given on receipt of advices.

Citing *Kalmbach, Inc.* v. *Insurance Company of the State of Pennsylvania*, 529 F.2d 552 (9th Cir. 1976), plaintiffs urge that the "held covered" clause negates the implied warranty of seaworthiness. Unlike in *Kalmbach*, however, the clause is completely inapposite to the facts in this case. The "equitable premium" to which the clause refers is that which the insurer would customarily have charged for the voyage in question had the actual condition of the vessel been known. It is absurd to suggest that an insurer would consider charging an "equitable premium" for the unseaworthiness present in this case, when such a premium would at least equal the

face value of the coverage. *Kalmbach* is consistent with the only reasonable conclusion: where a breach of the implied warranty of seaworthiness would proximately cause the constructive total loss of the vessel, the "held covered" clause will not negate the breach.

23. It is unnecessary to determine whether plaintiffs [sic] breached the implied covenant of dealing in utmost good faith. Because the court has found that plaintiffs did breach the implied warranty of seaworthiness, they may not recover for damages proximately caused by the unseaworthiness of the YCV-9.

24. Even if the warranty of unseaworthiness had not been breached, the underwriter would only be liable if the loss had been proximately caused by a peril covered by the policy. Under a marine policy, the assured has the burden of proving that the loss arose from a covered peril. *Antilles Steamship Co., Ltd.* v. *Members Of American Hull Insurance Syndicate*, 733 F.2d 195 (2d Cir. 1984); *Darien Bank* v. *Travelers Indemnity Co.*654 F.2d 1015 (5th Cir.1981).

25. The "Perils of the Sea" clause provides:

> TOUCHING the Adventures and Perils which we, the said Assurers, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c. or any part thereof.

To recover under this clause, plaintiffs would have to show by a preponderance of the evidence that at least one of these perils proximately caused the loss.

26. Perils of the sea are those perils which are peculiar to the sea, and "not the inevitable result of the action of the elements on the fabric of the vessel or its cargo." *Darien*

*Bank*, 654 F.2d at 1021 (citations omitted). A loss is occasioned by a peril of the sea when it results from the unforeseen action of the sea, and not when it is caused by the defective or deteriorated condition of the vessel.

27. The evidence clearly established that the constructive total loss of the YCV-9 was caused by its deteriorated underwater hull. The ordinary wear and tear of the voyage to Seattle is not covered by the Perils of the Sea clause. *By's Chartering Service, Inc.* v. *Interstate Insurance Co.*, 524 F.2d 1045, 1047 n.1 (1st Cir. 1975); *Capital Coastal Corp.* v. *Hartford Fire Insurance Co.*, 378 F. Supp. 163, 168-69 (E.D. Va. 1974).

28. Because the loss was caused by the unseaworthy character of the YCV-9, the loss here was also not covered by either the additional vessels or additional perils clauses of the policy.

29. The drydocking and temporary repair expenses at Lockheed, and the expenses of beaching and maintaining the barge, the latter of which continue, have also been proximately caused by the unseaworthy condition of the barge and, therefore, are not covered under the policy.

30. Although the forfeiture of insurance coverage it Strongly disfavored, *Avemco Insurance Co.* v. *Chung*, 388 F. Supp. 142 (D. Hawaii 1975), the court concludes that plaintiffs may not recover against Pacific Marine on the policy.

31. No bad faith was involved in Pacific Marine's refusal to pay benefits under the policy. Plaintiffs' claim for exemplary damages therefore fails.

32. Pacific Marine must pay plaintiffs the sum of $2,250, the premium plaintiffs paid on the YCV-9. Because the entire premium is allocated to hull coverage, and no separate premium was paid for protection and indemnity coverage, the entire premium must be returned.

33. Neither plaintiffs nor defendants shall recover their attorneys' fees or costs.

34. Any of the foregoing conclusions of law which are properly findings of facts shall be considered findings of fact.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 25, 1985

/s/ Harold M. Fong

UNITED STATES DISTRICT JUDGE

GEORGE POYSKY, et al. v. PACIFIC MARINE INS. CO., et al. CIVIL NO. 82-0731 — In Admiralty

(Findings of Fact and Conclusions of Law)

[File Stamped 10-25-85]

## APPENDIX D

## LUMP SUM TOWAGE AGREEMENT

IT IS AGREED this 23rd day of SEPTEMBER, 1982, between DILLINGHAM TUG & BARGE CORPORATION, a Hawaii corporation and subsidiary of Dillingham Corporation, whose principal place of business and mailing address is Pier 21, P.O. Box 3288, Honolulu, Hawaii 96801, ("TUG OWNER"), and ALASKA TOWING, whose mailing address is 18627 First Avenue, South, Seattle, Washington 98148, ("CUSTOMER"), as follows:

**ARTICLE 1. SERVICES TO BE FURNISHED.**

1.1 TUG OWNER agrees to furnish tug MIKIALA II, Official Number 585509, (the "Tug"), and to use reasonable efforts to tow barges YCV-9 and YFNB-13, (hereinafter collectively the "Tow"), from Pearl Harbor, Oahu, Hawaii, to Seattle, Washington. The towage shall commence on or about September 24, 1982.

1.2 TUG OWNER shall not be required at any stage of performance of this Agreement to proceed to any location which the Tug and Tow cannot safely reach or at which the Tug and Tow cannot at all times of tide and weather safely lie afloat. TUG OWNER does not guarantee any particular speed during the voyage and does not warrant delivery of the Tow at destination at any particular date or time or to meet any particular market or in time for any particular use.

1.3 CUSTOMER shall not deliver or cause to be delivered to TUG OWNER any cargo or substance for towage pursuant to this Agreement, nor shall the towage of any such cargo or substance be required by the terms of this Agreement, the possession or towage of which may result in seizure of the Tug or Tow by any governmental authority or other person, firm or corporation.

1.4 All documentation for the Tow shall be the sole responsibility of CUSTOMER and TUG OWNER shall not be responsible for any consequence arising through any act or omission of CUSTOMER in connection with the export or entry declarations in respect of the tow. If TUG OWNER or

the Tug incurs a penalty or if the Tug or Tow is delayed as a result of CUSTOMER's failure to satisfy its obligations in the preceding sentence, CUSTOMER shall reimburse TUG OWNER for any such penalty and shall pay TUG OWNER for any such penalty and shall pay TUG OWNER additional compensation at the rate set forth in Article 3 for any such delay.

**ARTICLE 2. LUMP SUM CHARGE.**

CUSTOMER shall pay towage charges to TUG OWNER for the towage service provided for in this Agreement in the lump sum of SEVENTY-FIVE THOUSAND AND NO/100 DOLLARS ($75,000.00), F.I.O., (plus applicable taxes and other charges referenced below in Article 7, PORT AND OTHER CHARGES). The towage charges specified above shall become fully and irrevocably earned by TUG OWNER upon commencement of the towage service regardless of whether or not the Tow or cargo aboard it, if any, is lost, disabled, or the Tow or cargo aboard it, if any, is unable or unfit to continue to destination. Payment of the towage charges (and other amounts required by Article 7 to be paid to TUG OWNER) shall be made by CUSTOMER to TUG OWNER without discount or setoff at TUG OWNER's office address first set out hereinabove on or before October 15, 1982.

**ARTICLE 3. DELAY CHARGES.**

If TUG OWNER is delayed in performing the towage service as a result of the Tow's not being ready when the Tug arrives to commence towage or thereafter as a result of any cause attributable to the fault of CUSTOMER or to CUSTOMER's default in performing this Agreement, CUSTOMER shall pay to TUG OWNER for the period of any such delay, in addition to any other amounts required by the terms of this Agreement to be paid by CUSTOMER to TUG OWNER, the Tug's daily rate of hire at the rate of EIGHT THOUSAND EIGHT HUNDRED AND NO/100 DOLLARS ($8,800.00) per running (consecutive) day, or fraction of any such running (consecutive) day, payable upon invoicing by TUG OWNER; PROVIDED, HOWEVER, if the

period of delay exceeds ten (10) running (consecutive) days, CUSTOMER shall, at TUG OWNER's option, be liable to TUG OWNER for actual damages for detention at a rate not less than the Tug's daily rate of hire specified above.

**ARTICLE 4. TOW WARRANTED SEAWORTHY; MULTIPLE TOWS.**

4.1 CUSTOMER warrants and represents that the Tow, at the time it is tendered to the Tug and towage (i) shall be seaworthy and in all respects ready for and capable of making the specified voyage, and (ii) shall be properly and sufficiently equipped with navigation lights, towage shape, chain bridle and towing bitts.

4.2 TUG OWNER shall be responsible for making up the tow and for determining the method and position in which it shall be towed and the time of sailing. TUG OWNER shall have the absolute right to tow more than one towed vessel, whether in tandem or by any other method which TUG OWNER deems proper.

4.3 TUG OWNER is under no obligation to inspect the Tow for seaworthiness.

**ARTICLE 5. CONDITION OF THE TUG; SURVEY.**

5.1 While nothing contained in this Agreement shall be construed as a warranty of seaworthiness of the Tug, TUG OWNER covenants that the Tug, at the time of commencement of the towage service under this Agreement, shall be in a seaworthy and serviceable condition to the extent due diligence can make it so and shall be provided with all certificates, licenses and documents required by the United States Coast Guard and the American Bureau of Shipping to perform the specified towage service.

5.2 Prior to the commencement of the towage service a survey of the Tow (and Tug, if required) shall be conducted by a mutually agreeable surveyor at the sole cost and expense of CUSTOMER to enable CUSTOMER and its underwriters to obtain a certificate of surveyors approving the Tug, the Tow and the towing arrangement for the intended voyage. If the surveyor shall recommend a specific voyage route or

limitation in speed or anything else which will delay delivery of the Tow and cargo aboard it, if any, at the designated destination or otherwise materially change the scope of performance upon which the towage charge in Article 2 above was determined by TUG OWNER, TUG OWNER shall be entitled to receive and CUSTOMER shall pay an additional charge for such delay or change in scope of performance computed at the Tug's daily rate of hire set forth in Article 3, DELAY CHARGES.

**ARTICLE 6. VESSEL SUBSTITUTION; DELEGATION.**

TUG OWNER shall have the right (but not the obligation) without restriction as to number of times to substitute another tug for the Tug, provided the substituted tug shall be equivalent in capacity and capability to the Tug. Any such substitution shall not alter the terms, covenants or conditions of this Agreement. TUG OWNER shall have the right to delegate any of its duties under this Agreement, whether by subcontract or otherwise, and to assign this Agreement to an affiliate or successor in interest, provided that no such delegation or assignment shall diminish TUG OWNER's responsibility to CUSTOMER.

**ARTICLE 7. PORT AND OTHER CHARGES.**

CUSTOMER shall be liable for the direct payment, or reimbursement to TUG OWNER if such shall be paid by TUG OWNER, of (i) that portion of all prot charges, pilotage fees, dockage, wharfage, harbor entrance fees, agency fees, and similar fees for services or use Of facilities, and all taxes (except net income taxes) incurred or accruing as a result of or in connection with services rendered under this Agreement, (ii) all fees, taxes and due levied, assessed or accruing against the cargo or the Tow, and (iii) ramp rental charges, additional tug assistance or barge shifting costs necessitated by CUSTOMER's instructions or directions or otherwise deemed prudent by TUG OWNER.

**ARTICLE 8. LIBERTIES.**

The Tug shall have liberty to said with or without pilots, to tow or be towed, and to deviate for the purpose of repair,

assisting vessels in distress, saving life or property, landing any ill or injured person on board or taking on fuel, supplies or other necessaries.

**ARTICLE 9. CARGO HANDLING.**

If cargo is to be carried aboard the Tow, CUSTOMER shall be responsible for all cost, risk and expense of loading, stowage, trimming and discharge of cargo on and discharging of cargo from the Tow. In the event that CUSTOMER requests and TUG OWNER consents to use the services of the master and/or crew of the Tug to load cargo aboard or discharge cargo from the Tow, CUSTOMER shall pay TUG OWNER for such services at the cargo handling rate set forth in TUG OWNER's applicable collective bargaining agreement plus an additional charge of twenty-one percent (21%) to cover handling and administration costs.

**ARTICLE 10. LIMITATIONS OF AND EXEMPTIONS FROM LIABILITY.**

10.1 TUG OWNER, the Tug and its owners, operators, agents and charterers shall be entitled to assert by way of limitation of or exemption from liability any principle of law or any provision of any statute or regulation of the United States, or other applicable jurisdiction, that affords a vessel and its owners (or a carrier if cargo is carried aboard the Tow) a limitation of or exemption from its liability. The provisions of any such principle of law, statute or regulation, including, without limitation, the Limitation of Liability Statutes of the United States are incorporated into this Agreement by this reference as though fully set forth in this Article. Nothing contained in this Agreement shall be construed to deprive TUG OWNER of any other right to limit its liability. CUSTOMER waives any claim that this is a personal contract of TUG OWNER.

10.2 TUG OWNER, the Tug and its owners, operators, agents and charterers shall not be responsible for any loss, damage, injury, death, or delay or failure in performing this Agreement, arising or resulting from acts of God, force majeure, perils of the sea, ice, saving or attempting to save

life or property at sea, latent defects in the Tug not discoverable by due diligence, public or proprietary acts of any governmenal authority (whether executive, legislative, judicial or otherwise), labor disputes of whatsoever nature not attributable to a violation of law by TUG OWNER, criminal acts by third parties, war or other hostilities, acts of terrorism, riot or civil commotion, acts or omissions of CUSTOMER or cargo owner or the agents or representatives of either, or any other cause of any nature whatsoever to the extent it is beyond the control and without the fault of TUG OWNER. Regardless of whether or not the same have been arranged by TUG OWNER, TUG OWNER shall have no liability with respect to the services of any assisting tugs which are not owned or operated by TUG OWNER or its affiliates or with respect to the Tow's riding crew, if any, or with respect to any lights or signaling equipment on the Tow.

10.3 Except as otherwise expressly set forth in this Agreement, TUG OWNER makes no express warranty of any kind with respect to its performance and, to the extent permitted by law, disclaims all implied and statutory warranties of any nature whatsoever, including, without limitation, any warranty of workmanlike service. TUG OWNER shall not be liable for any incidental or consequential damages of any nature whatsoever.

**ARTICLE 11. INDEMNITY.**

11.1 CUSTOMER shall indemnify, defend and hold TUG OWNER harmless from all claims, demands, actions, causes of action and liabilities of any nature whatsoever (including costs and attorneys' fees incurred by TUG OWNER in defending against all such liabilities or in enforcing this indemnity provision) which, during the terms of performance of this Agreement, arose out or were connected with (i) failure of CUSTOMER to perform or satisfy any covenant or condition required by the terms of this Agreement to be performed or satisfied by CUSTOMER, (ii) negligent acts or omissions or other fault of CUSTOMER, or (iii) violation of any environmental pollution statute or regulation for pollution attributable to the Tow or cargo aboard it, if any.

11.2 All obligations and liability of CUSTOMER to indemnify, defend and hold TUG OWNER harmless pursuant to the terms of this Agreement shall survive termination, cancellation or expiration of this Agreement.

**ARTICLE 12. CUSTOMER INSURANCE.**

As part of the bargained for consideration for this towage service, CUSTOMER shall procure and maintain, at its sole cost and expense, during the entire period of performance of this Agreement by TUG OWNER, the following insurance with companies satisfactory to TUG OWNER:

12.1 Hull and Machinery Insurance upon the Tow in an amount equal to its full actual delivered value, and Marine Cargo Insurance (including risks of loading and discharging) on any cargo aboard the Tow in an amount equal to its full actual delivered value, plus freight, on terms equivalent to the broadest coverage available from American underwriters, provided, any deductible or franchise shall not exceed an amount satisfactory to TUG OWNER and shall be for the sole account of CUSTOMER; and

12.2 Protection and Indemnity Insurance insuring its liability as owner of the Tow for, without limitation, wreck removal expenses and for third party claims (including those involving its employees) arising from death or personal injury, or from loss of or damage to property, with a minimum limit of $1,000,000 applicable to any one accident or occurrence, provided, any deductible or franchise shall not exceed an amount satisfactory to TUG OWNER and shall be for the sole account of CUSTOMER; and

12.3 Pollution Insurance, if the Tow or anything aboard the Tow contains oil or hazardous substances, insuring (i) cost of cleanup in the event of a spill or leakage (with a minimum limit sufficient to meet any minimum amount required by law), and (ii) liability for third party claims in the event of a spill or leakage (with a minimum limit of $2,500,000 applicable to any one accident or occurrence), provided, any deductible or franchise applicable to (i) and (ii) above shall not exceed an amount satisfactory to TUG OWNER and shall be for the sole account of CUSTOMER; and

12.4 Each of the aforesaid policies shall provide for ten (10) days' notice to TUG OWNER of cancellation or modification and shall name TUG OWNER and its affiliates as additional assureds and expressly waive subrogation against TUG OWNER and its affiliates, any vessel used by TUG OWNER or its affiliates in the performance of this Agreement and the master and crew of any such vessel. It is the intent of TUG OWNER and CUSTOMER that all liabilities of TUG OWNER and its affiliates, any vessel used by TUG OWNER or its affiliates in the performance of this Agreement and the master and crew of any such vessel, arising out of or connected with this Agreement shall be covered by appropriate marine insurance and the rates prescribed for the towage service have been predicated upon this basis. In the sole event that CUSTOMER satisfies its obligation to procure and maintain Protection and Indemnity Insurance pursuant to Article 12.2 above by membership in a foreign Protection and Indemnity Club of which TUG OWNER is not a member and which, without exception, refuses to name nonmembers as additional assureds, TUG OWNER and its affiliates agree to waive the aforesaid requirement that they be named additional assureds on such Protection and Indemnity Insurance so long as the subject Protection and Indemnity Club waives subrogation against TUG OWNER and its affiliates, any vessel used by TUG OWNER or its affiliates in the performance of this Agreement and the master and crew of any such vessel.

12.5 Prior to the commencement of performance by TUG OWNER under this Agreement, or as soon thereafter as is practicable, CUSTOMER shall furnish TUG OWNER with certificates or duplicate copies evidencing compliance with this Article 12. No act of TUG OWNER, in commencing performance under this Agreement or otherwise, shall constitute a waiver of compliance with this Article 12 by CUSTOMER.

12.6 Unless otherwise agreed in writing, CUSTOMER may not elect to self-insure the risks required to be insured against under 12.1, 12.2 and 12.3 above. In the event of any loss, damage, injury or death which would have been or is

covered by insurance specified in 12.1, 12.2 and 12.3 above, CUSTOMER agrees to look solely to the applicable underwriter or to any responsible third party.

**ARTICLE 13. TUG OWNER INSURANCE.**

TUG OWNER shall, during the entire period of this performance under this Agreement, procure and maintain the following insurance at its sole cost and expense:

13.1 Hull and Machinery Insurance upon the Tug in an amount equal to the full actual value of its interests insured, provided, any deductible or franchise shall be for the sole account of TUG OWNER; and

13.2 Protection and Indemnity Insurance insuring its liability as owner of the Tug for wreck removal expenses and for third party claims (including those involving its employees) arising from death or personal injury, or from loss of or damage to property, with a minimum limit of $1,000,000 applicable to any one accident or occurrence, provided, any deductible or franchise shall be for the sole account of TUG OWNER.

13.3 If CUSTOMER so requests, each of the aforesaid policies shall name CUSTOMER as an additional assured and expressly waive subrogation against CUSTOMER to the extent permitted by the policies, provided CUSTOMER shall not be named an additional assured with waiver of subrogation for risks required to be covered by CUSTOMER insurance in accordance with Article 12 above.

**ARTICLE 14. TUG OWNER'S LIEN.**

TUG OWNER shall have a maritime lien on the Tow and on all cargo aboard the Tow, and all freights and subfreights, to secure payment of any amounts due under this Agreement. CUSTOMER will not suffer, or permit to be continued, any lien or encumbrance incurred by it or its agents, or under or through its directions or directions of its agents, which might have priority over the title and interest of TUG OWNER in the Tug.

## ARTICLE 15. BOTH TO BLAME COLLISION CLAUSE.

If the Tug or Tow comes into collision or contact with another vessel or object as a result of the negligence of the other vessel and any act, neglect or default of TUG OWNER or of the master, mariners, pilot or servants of TUG OWNER in the navigation, management or maintenance of the Tug or Tow, CUSTOMER will indemnify TUG OWNER, its officers and employees, and the Tug against all loss or liability to the other or non-carrying vessel or her owners or any third parties insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of TUG OWNER or the owners of the cargo or their underwriters, paid or payable by the other or non-carrying vessel or her owners or any third parties to TUG OWNER or the owners or underwriters of the cargo and set off, recouped, or recovered by the other non-carrying vessel or her owner or any third parties as part of their claim against TUG OWNER, its officers, employees, or any of its vessels. The foregoing provisions shall also apply where the owners, operators or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect of a collision or contact.

## ARTICLE 16. SALVAGE.

All derelicts and salvage shall be for TUG OWNER's and CUSTOMER's equal benefit after deducting TUG OWNER's and CUSTOMER's expenses and crew's PROPORTION.

## ARTICLE 17. GENERAL PROVISIONS.

17.1 All notices and communications required by the terms of this Agreement from TUG OWNER to CUSTOMER and from CUSTOMER to TUG OWNER shall be made in writing and addressed to the respective address of the other party as set forth above in the preamble or such other address of which the party seeking to give notice has been advised in writing.

17.2 This instrument constitutes the entire agreement between the parties with respect to the intended towage

service. Neither party is relying or may rely on any written or oral collateral, prior or contemporaneous agreement, assurance, representation or warranty not set forth in this instrument. No modification of this instrument shall be implied in law, equity or admiralty, nor shall any express modification be effective unless in writing signed by the party to be charged.

17.3 In the event payment is not made when due, TUG OWNER shall be entitled to charge to and recover from CUSTOMER all costs and expenses, including reasonable attorneys' fees, incurred in collecting the overdue amount. All sums due and to become due under this Agreement, if unpaid when due, shall, if permitted by law, bear interest at the rate of eighteen percent (18%) per annum from and after the date upon which the same shall have become due and payable pursuant to the terms of this Agreement until paid in full. If the aforesaid rate is not permitted by the law of the State of Hawaii or of the United States, whichever is controlling, the interest rate applicable to delinquent payments shall be the maximum allowed to be agreed to under the law of the State of Hawaii or of the United States, whichever is controlling.

17.4 Captions used in this Agreement are for convenience of reference only and shall have no force or effect or legal meaning in the construction or enforcement of this Agreement.

17.5 This Agreement shall be for the benefit of and be binding upon both parties, their successors and permitted assigns.

17.6 All limitations of and exemptions from liability and entitlement to indemnity, applicable to TUG OWNER by law or the terms of this Agreement, shall apply to TUG OWNER, DILLINGHAM CORPORATION, affiliates of either, their officers, directors, employees and agents, and to any vessel owned or chartered by any of the above, and the master and crew of any such vessel.

17.7 Any suit, action or proceeding brought by either party in consequence of or to enforce any term or provision

of this Agreement shall be commenced in the First Circuit Court of the State of Hawaii or the United States District Court for the District of Hawaii at Honolulu, Hawaii, as appropriate. CUSTOMER submits to the jurisdiction of the courts of the State of Hawaii and consents to service of process as provided in Section 634-35(a)(1), Hawaii Revised Statutes. CUSTOMER submits to the jurisdiction of the United States District Court for the District of Hawaii and consents to service of process by certified mail, return receipt requested, addressed in accordance with Article 17.1 above. The prevailing party in any such suit, action or proceeding shall be entitled to recover its costs of suit and reasonable attorneys' fees.

17.8 Unless notice in writing of specific loss, damage or any other claim of any nature whatsoever is given to TUG OWNER in accordance with Article 17.1 above within five (5) days after delivery of the Tow to the port or place designated as the destination, such delivery shall be deemed to be prima facie evidence of the delivery of the Tow and cargo aboard it, if any, in good order and condition. TUG OWNER and the Tug shall be discharged from all liability in respect of loss or damage claims arising under this Agreement unless suit or action is brought within one (1) year after delivery of the Tow and cargo aboard it, if any, or within one (1) year after the date when the Tow and cargo aboard it, if any, should have been delivered.

17.9 The interpretation of this Agreement and of the rights and obligations of the parties in law, equity or admiralty shall be governed by the substantive law of the State of Hawaii and the general maritime law of the United States, insofar as applicable.

17.10 If any term or provision, or any part of any term or provision, of this Agreement is held by any court or other competent authority to be illegal or unenforceable, the remaining terms, provisions, rights and obligations shall not be affected.

**ARTICLE 18. SPECIAL PROVISIONS.**

18.1 CUSTOMER shall be liable for any costs attributable to the Tow at Pearl Harbor and/or Seattle.

18.2 TUG OWNER shall release the Tow to CUSTOMER at the West Seattle Buoy at Seattle. In the event CUSTOMER does not take the Tow away on arrival, TUG OWNER shall charge CUSTOMER the amount of EIGHT THOUSAND EIGHT HUNDRED AND NO/100 DOLLARS ($8.800.00) per day or pro rata part thereof for any delay time until the Tow is taken away.

**ARTICLE 19. WARRANTY OF PERSON SIGNING.**

The person signing below on behalf of CUSTOMER warrants (i) having read and understood the above provisions, and (ii) having been authorized to sign this Agreement on behalf of CUSTOMER.

ACCORDINGLY, the parties have signed this Agreement as of the date first set forth above.

DILLINGHAM TUG & BARGE CORPORATION

By: /s/ KENT WHITMAN

Its: *Vice President & General Manager*
TUG OWNER

ALASKA TOWING

By: /s/ GEORGE POYSKY

Its: *President*
CUSTOMER

## GUARANTY

George Poysky, an individual, ("GUARANTOR") whose residence address is _____

_____,

hereby guarantees payment on or before October 15, 1982 of all sums owing to TUG OWNER pursuant to Article 2 of the Lump Sum Towage Agreement dated _____ set forth above. GUARANTOR waives any right to require TUG OWNER to proceed against CUSTOMER or the Tow as a condition to proceeding against GUARANTOR under this Guaranty. GUARANTOR further waives all presentments, demands for performance, protests and notices of nonperformances.

Dated: _____ /s/ GEORGE POYSKY

George Poysky, an individual

GUARANTOR

## APPENDIX E
(THIS PORTION IS PRINTED)

TUG HULL FORM
1955

To be attached to Policy No. 82 OM 08058
of the PACIFIC MARINE INSURANCE COMPANY

1. INSURING

(as attached)

2. ITS SUCCESSORS OR ASSIGNS, FOR ACCOUNT OF WHOM IT MAY CONCERN.

3. LOSS, IF ANY, (Excepting Claims Required to be Paid to Others Under the Collision Clause) PAYABLE TO

(as attached) OR ORDER.

4. DO MAKE INSURANCE AND CAUSE THEM TO BE INSURED, LOST OR NOT LOST, TO THE AMOUNT OF (as attached)

DOLLARS ($ ) (as attached)

5. AT AND FROM THE (as attached) DAY OF (as attached) TO THE (as attached) DAY OF (as attached) beginning and ending with (as attached) time.

6. Should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

7. This policy is agreed to cover the Vessel herein insured as employment may offer, in port and at sea, in docks and graving docks, and/or on ways, gridirons and pontoons, at all times, in all places and on all occasions, situations, services and trades whatsoever and wheresoever, under power or sail; with leave to sail or navigate with our without pilots, to tow and to be towed, and to assist vessels and/or craft in all situations and to any extent, to

render salvage services and to go on trial trips; upon the Body, Tackle, Apparel, Machinery, Boilers, etc., equipment and everything connected therewith, Ordnance, Munitions, Stores, Artillery, Boats and other Furniture of and in the Vessel called the:-

(as attached)

or by whatsoever other name or names the said Vessel is or shall be named or called, beginning the adventure upon the said Vessel, etc., as above, and shall so continue and endure during the period as aforesaid. It shall be lawful for the said Vessel, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and whereso-ever without prejudice to this insurance. With liberty to discharge, exchange, and to take on board goods, specie, passengers and stores, wherever the Vessel may call at, or proceed to, without being deemed a deviation, and with liberty to carry goods, live stock, &c., on deck or other-wise, and underwriters are liable for contribution towards the jettison of same. Including all risks of docking, un-docking, changing docks or moving in harbour as often as may be required and going on or off slipway, gridiron and/or pontoon and/or in graving dock as often as may be done during the currency of this Policy and/or of adjusting compasses. The said Vessel, etc., for so much as concerns the Assured, by agreement between the Assured and Assurers in this Policy, is and shall be valued at (as below) which value for purpose of franchise shall be di-vided as follows:-

8. Hull, Tackle, Apparel, Equipment, Stores, Boats and Furniture, etc., $ (as attached)

Machinery, Boilers, Equipment, Motor Generators and other Electrical Machinery and everything con-nected therewith $ (as attached)
$ (as attached)

Winches, Cranes, Windlasses and Steering Gear shall be deemed to be part of the Hull and not of the Machinery.

9. The Insurers to be paid in consideration of this insurance

Dollars being at the rate of (as attached) per cent.

10. Omitted.

11. Held covered in the event of any breach of warranty, or deviation from the conditions of this Policy, at an equitable premium to be arranged, notice to be given on receipt of advices.

12. Omitted.

13. Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be particular or General.

14. Omitted.

15. Omitted.

16. Omitted.

17. TOUCHING the Adventures and Perils which we, the said Assurers are contented to bear and take upon us they are of the Seas, Men-of-War, Fire, Lightning, Earthquake, Enemies, Pirates, Rovers, Thieves Jettisons. Letters of Mart and Countermart Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what Nation, condition or quality soever, Barratry of the Master and Mariners, and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c. or any part thereof. And in case of any Loss or Misfortune it shall be lawful for the Assured and/or Charterers and/or Operators and/or Lessees their Factors, Servants and Assigns, to sue, labor and travel for, in and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance; to the Charges whereof the said Insurance Company will contribute according to the Rate and Quantity of the sum herein insured. And it is expressly declared and agreed that no acts of the Assurers or Assured in recovering saving or preserving the property

insured shall be considered as a waiver or acceptance of abandonment.

18. Omitted.

19. Omitted.

20. Omitted.

21. Omitted.

22. Omitted.

23. Omitted.

24. No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

25. In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

26. In the event of Total Loss or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

27. Omitted.

28. First Line Omitted.

This policy also covers the affiliated companies of the Assured be they Owners, Subsidiaries, or Inter-related companies, and as Bareboat Charterers, or Charterers or Subcharterers or Operators in whatever capacity and is without right of subrogation against them.

29. Omitted.

30. Omitted.

31. Omitted.

32. Omitted.

33. Omitted.

34. Omitted.

35. Omitted.

NB—Printed form of Protection and Indemnity Policy omitted.

(FOLLOWING PORTION IS TYPED)

**HULL AND MACHINERY**
**PROTECTION AND INDEMNITY**
**1982–1983**

| | | | |
|---|---|---|---|
| Assured: | Samoan Maritime, Ltd. | | |
| Vessel: | Tug "Eva F" | | |
| Sum Insured: | Hull and Machinery | — | $ 350,000 |
| | Protection and Indemnity | — | $1,000,000 |
| Premium: | Hull and Machinery | — | $8,750.00 |
| | Protection and Indemnity | — | $8,000.00 |
| At and From: | May 21, 1982, Noon, P.S.T. | | |
| To: | May 21, 1983, Noon, P.S.T. | | |

Special Conditions and Warranties:

With respect only to the Hull and Machinery Policy and the printed Tug Hull Form (McLelland 2139) attached:

1. Omitted.
2. Omitted.
3. *Deductible.* Clause 12 of the printed Hull form is deleted and replaced as follows:

Notwithstanding anything in this Policy to the contrary, there shall be deducted from the aggregate of all claims arising out of each separate accident, the sum of $5,000, unless the accident results in a Total Loss of the Vessel, in which case this clause shall not apply. A recovery from other interests, however, shall not operate to exclude claims under this Policy provided the aggregate of such claims arising out of one separate accident if unreduced by such recovery exceeds that sum. For the purpose of this clause each accident shall be treated separately, but it is agreed that (a) a sequence of damages arising from the same accident shall be treated as due to that accident, (b) all heavy weather damage which occurs during a single round voyage shall be treated as though due to one accident.

4. Omitted.

5. *Additional Perils.* Clause #18 of the printed Hull form is deleted and the following substituted therefore:

This insurance also specially to cover (subject to the Deductible) cost of repairs or loss or damage to the subject matter insured directly caused by accidents in loading, discharging or handling cargo, or in bunkering, or in taking fuel; or by accidents in going on or off, or while on drydocks, graving docks, ways, gridirons or pontoons; or by explosions on shipboard or elsewhere; or by breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull; or by breakdown of or accidents to nuclear installations or reactors not on board the insured vessel; or by contact with aircraft, rockets or similar missiles or with any land conveyance; or through negligence or error of judgement of Master, Mariners, Officers, Engineers, Crew, Pilots, or other Servants or Employees of the Shipowners or Charterers or Operators or Lessees, Pilots, Servants of Employees of Port, Harbor or Dock Authorities, Stevedores, Laborers, Repairers, Tradesmen or other Persons employed in,

near or about the Ship; or from other causes of whatsoever nature arising either on shore or otherwise, howsoever, causing loss of or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the vessel, or any of them. Masters, Officers, Mates, Engineers, Crew or Pilots are not to be considered Owners within the meaning of this clause should they hold shares in the vessel.

6. Omitted.
7. Omitted.
8. Omitted.
9. Omitted.
10. Omitted.

With respect to both the Hull and Machinery and Protection and Indemnity Policies:

1. *Additional Vessels.* It is understood and agreed that additional vessels purchased by, chartered to, leased to, loaned to, rented by or operated by the Assured on which the Assured is obliged to arrange insurances are, with or without prior notice to Assurers, automatically covered hereunder, and insurances attach from moment of vessel becoming at Assured's risk but not exceeding $350,000 any one vessel with respect to Hull and Machinery Insurances. Assured agrees to report such additional vessels as above as soon as facts are known to Assurers and pay premium at pro rata of appropriate Tug and/or Barge rates as agreed. Full annual premium is guaranteed Assurers in the event of a Total or Constructive Total Loss.
2. Omitted.
3. *Trading Warranty.* Vessel warranted confined to the coastal waters and tributaries of Washington, Oregon, California, British Columbia, Southeastern and Southwestern Alaska not West of Adak Strait and including the waters and tributaries of Bristol Bay and the Bering Sea not North of Kotzebue Sound except during the

period October 15, to April 15 vessel shall be warranted out of Bristol Bay and Bering Sea and tributaries, or held covered.

Endorsement No. 2 to be attached to and made a part of Policy No. 82 OM 08058 (Hull) and 82 PI 08128 (P&I) Of PACIFIC MARINE INSURANCE COMPANY issued to SAMOAN MARITIME, LTD.

3. In consideration of an additional premium of $4,500.00, it is agreed that insurances hereunder attach on the Barges "YCV 9" and "YFNB 13" for a voyage from Pearl Harbor, Hawaii to Seattle, Washington, subject to Policy terms and conditions and as shown hereinafter.

   Insurances hereunder commence with the making of the barges for the trip in tow of the Dillingham Tug & Barge Corporation Tug "Mikiala II" and continue during the course of the voyage until the "Mikiala II" releases the tow to the Assured at Seattle, Washington, or held covered. It is noted that the tow departed September 24, 1982.

   With respect to the voyage insurances provided hereunder, Dillingham Tug & Barge Corporation and its affiliates, Max Rouse & Sons, Inc. and Max Rouse & Sons Northwest, are included as additional Assureds without subrogation.

   Hull Loss Payee with respect to Barge "YCV 9": Samoan Maritime, Ltd., Max Rouse & Sons, Inc., Max Rouse & Sons Northwest and Morton Marine, Inc., as their interests may appear, or order.

   Hull Loss Payee with respect to Barge "YFNB 13": Samoan Maritime, Ltd., Max Rouse & Sons, Inc. and Max Rouse & Sons Northwest, as their interests may appear, or order.

   In the event of a Total Loss of a Vessel from perils insured against, premium calculated at the rate of 3.00% shall be due and immediately payable for the Vessel lost.

Voyage Hull Deductible each Vessel: $10,000.

| Vessel | Policy | Sum Insured | Voyage Premium |
|---|---|---|---|
| "YCV 9" | Hull | $ 225,000 | $2,250.00 |
| | P&I | 1,000,000 | Included |
| "YFNB 13" | Hull | $ 225,000 | $2,250.00 |
| | P&I | 1,000,000 | Included |
| | | | $4,500.00 |

All other terms and conditions remaining unchanged.

GENE SAUSE & COMPANY

October 6, 1982

## APPENDIX F

Hawaii Revised Statutes

§431-419 Warranties, misrepresentations in applications. All statements or descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed to be representations and not warranties. A misrepresentation, unless it was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer, shall not prevent a recovery on the policy.

Marine Insurance Act of 1906 (MIA), 6 Edw. 7 ch. 41

§2. Mixed sea and land risks.

---

(2) Where a ship in course of building, or the launch of a ship or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined.

§3. Marine adventure and maritime perils defined.

---

(2) . . . "Maritime perils" means the perils consequent on, or incidental to, the navigation of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

§17. Insurance is *uberrimae fidei.*

A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

§18. Disclosure by assured.

(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely —

(a) any circumstance which diminishes the risk;

(b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) any circumstance as to which information is waived by the insurer;

(d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

§25. Voyage and time policies.

(1) Where the contract is to insure the subject-matter at and from, or from one place to another or others, the policy is called "voyage policy," and where the contract is to insure the subject-matter for a definite period of time the policy is called "time policy." A contract for both voyage and time may be included in the same policy.

§27. Valued policy.

(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured.

§33. Nature of warranty.

(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be filled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

§34. When breach of warranty excused.

---

(3) A breach of warranty may be waived by the insurer.

§39. Warranty of seaworthiness of ship.

(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

---

(4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea to an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

§84. Return for failure of consideration.

(3) In particular—

(a) where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality of the insured; . . .

## RULES FOR CONSTRUCTION OF POLICY

§7. Perils of the seas.

The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include the ordinary action of the winds and waves.

## APPENDIX G

November 22, 1982

Samoan Maritime, Ltd.
c/o Gene Sause & Company
200 Southwest Market Street
Portland OR 97201

Attention: Mr. Doug Parks

RE: "BARGE YCV-9"
D/L: 10/15/82
Claim Number 15310 Under Policy 82 OM 08058

Gentlemen:

We have considered your tender of abandonment of the vessel and all other materials and information submitted by you and must advise you that we do not agree that the barge is a total loss by any peril insured against and therefore confirm our previous rejection of your tender of abandonment and deny your claim for total loss.

It is underwriters' position that the barge was unseaworthy at the commencement of the risk, by reason of severe wastage/deterioration of its hull. Underwriters are prepared, however, without prejudice to that position, to pay in exchange for a full release of all liabilities from all assureds/loss payees the cost of repair of the damages itemized in paragraph 3.1 of Lockheed invoice number BR 10465-24902F, together with the costs of diving, drydocking and cropping and sealing deck vents and manhole covers (items 1, 2 and 4), and, in addition, to pay reasonable towing charges in connection with the placement of the barge on drydock and its removal (less, of course, the $10,000 deductible). We know of no evidence that would attribute any other damage to an insured peril.

Maritime, Ltd.
D/L: 10-15-82
"Barge YCV-9"
Page Two

In denying liability on the ground of unseaworthiness, we are not asserting that you had actual knowledge of the wastage/deteriorated condition of the hull. In a "voyage" policy insuring the vessel for a specified voyage (as opposed to a policy insuring the vessel for a period of time), there is an absolute warranty of seaworthiness which is not conditioned on knowledge of unseaworthiness by the owner. See, for example, "Marine Insurance and General Average in the United States," by Buglass (2nd Edition), page 34. If a vessel is unseaworthy at the commencement of the voyage, the underwriters are relieved from liability for loss or damage, howsoever caused.

Notwithstanding our position that underwriters are not liable at all, we are, however, prepared to compromise on the basis of payment of the items described above, less the policy deductible of $10,000. That amount cannot be calculated from the Samoan information presently in our possession.

We will be pleased to consider any further information you may wish to submit.

Very truly yours,

PACIFIC MARINE INSURANCE COMPANY

Linda Pysher
Manager, Marine Department

Enclosure: Lockheed Invoice BR 10465-24902F

cc: Mr. George Poysky
18627 1st avenue South
Seattle, WA 98184

John F. Meadows, Attorney
425 California Street, Suite 1606
San Francisco, CA 94104

Martin P. Detels, Attorney

file

## APPENDIX H

## PLAINTIFF/PETITIONER

George Poysky RT 130:23 - 131:10

Q. What I want to know is how far off of the water was that deck of the YCV-9 when you were making this investigation of the exterior of the bow rake or the stern rake?

A. The deck was probably seven feet off the water.

Q. Only seven feet?

A. Yes.

Q. What was the draft of the YCV-9 when you were making the investigation?

A. About two feet.

Q. And what is the depth of the YCV-9?

A. It's actually about nine feet; they listed it a little different in the book. They listed it eight; it's a little more than that.

George Poysky - RT 73:1 - 77:23

Q. Specifically focusing on you and your brother's trip — I'm referring to your brother John Poysky — could you describe what your trip entailed as to going on board the YCV-9, for the first or any number of times, what you saw?

A. We came over together on a morning flight, and made arrangements 24 hours in advance to view these vessels, which was a requirement of the government; and he accompanied me the first day, and then he left I believe the next morning or the next noon, and I stayed for four or five days and surveyed them.

Q. Can you describe what you saw the first day, and then we'll go into even more detail as you describe what you saw . . . .

A. In regards to the VC-9?

Q. Yes, let's start with the YCV-9, since that's really the. . . .

A. Yes, we went aboard it, and it wasn't completely opened up. It was, say, rafted alongside of a YO Tanker, and had a small work barge on the outside of it, and I think one or two

compartments were open; and we had asked the lieutenant in charge to open up the rest of them, so that we could view them, and we wanted them to be open for 24 hours or a certain time to air them out, so we wouldn't get some bad air. And he had other business commitment, so he had to leave the next day; but I went aboard it the first day with him.

We viewed it as best we could from the outside, walked the sides of it, checked it out. We had bid on these same vessels in the past, and pretty well knew what we wanted to look at. And then I came back for two extra days, and spent probably maybe up to two or three hours of each day aboard it, after it was opened up.

Q. Let's go into some detail as to what you were looking at and for what purposes. You were looking at, say, let's start with the internal scantlings, as we call them, which compartments or all of the compartments that you went into?

A. Well, I went into all the compartments. Basically I looked at the structural condition of it; checked the paint, checked for rust, checked for water.

I carry a chipping hammer with me when I inspect vessels; and hammered on it, one thing or another; and leaned down along the side, and got down on the railings to get as close as I could to the waterline; inspected the marine growth on it, inspected the bridle that they had cut off, what was left of it; and just checked it for general appearance. Used the same criteria that I would use on inspecting any vessel that we buy.

Q. When you were using a hammer, was that in all compartments, in all areas, or just where there was rust indicated?

A. Pretty well in all areas; mostly on the bottoms and the sides and on some of the structural–I-beams, and one thing or another.

Q. Can you describe the amount of rust that you saw in the compartments, and identify those compartments where you saw more rust?

A. The vessel was painted inside, which is more or less unusual for this type of a barge; and the paint was in very good condition. I couldn't estimate how long the painting had been done, but it had indication, it also had indication that there had been some plates put in that hadn't been in too long, but they also were painted; and there was certain amount of rust, much less than there is on a normal vessel of this age and condition.

Q. Did you see more rust indicated in the bow rake and stern rake?

And, your Honor, when we're referring to the bow rake and stern rake, these are the very ends of the barge which are compartments (indicating at the easel), right below the bow and the stern.

A. I would say it was pretty even over the whole inside structure, as far as there wasn't any areas that were really busted out, any more so there was — sure, there was a little rust where some water had stood or where they had done a poor job of painting.

Q. When you were using your hammer, did you hit the rust areas to indicate, to find out anything?

A. I didn't find out anything. I hit them. You can normally tell the thickness of a piece of steel by hitting on it.

I didn't hear anything that would lead me to believe that there was deterioration.

Q. Did you go through all 18 compartments of the barge, your first visit?

A. The first visit, no, because they weren't open; but on my second and third, I went into all the compartments.

Q. Did anyone accompany you on any of those visits in those compartments?

A. Not after the first day. I met Bob Dickieson — I didn't know who he was — he was surveying, I think, the second day that I was there.

Q. You were in the company of John Poysky the first day, is that correct?

A. Yes.

Q. And do you know if he went in to all of the open compartments?

A. I believe he did. He accompanied me, yes.

Q. Were the bow rakes and stern rake compartments open?

A. Not the first day, no.

Q. Did you find any twisted or bent internal structures, such as longitudinals or transverse range (phonetic)?

A. No, the internals were very good, and it was a very well constructed barge; had two longitudinals, 18 compartments.

MR. LENKER: Your Honor, we're referring to these longer internal members (indicating on chart) as the longitudinals, and the shorter cross members as the transverse members (phonetic).

Q. Could you describe, then, the extent of your looking at the deck of the barge, focusing upon the entire deck and also the knuckle corners of the barge?

A. There was no external cracks on the deck or on the cowlings, and the deck was in excellent condition.

Q. What was the, or if you would, please, describe the extent of your investigation into the side shell of the barge, that is, the sides of the barge and also the outer portion of the hull, like the bow and the stern?

A. I went into all of the side shells; and all of the compartments on these particular barges are about the same size, except for the end rake and the stern rake; and I found them all to be in very satisfactory condition.

Q. Were you able to view the waterline portion of the side, both sides of the barge, the bow and the rake, from the exterior?

A. Yes, I did. There was a YO tanker on one side, and they had fender rails in between, which allowed me to get down in between them. I didn't get clear down into the water, but I was able to get down as far a as I thought it was necessary;

and it had less marine growth on it than the vessels that were tied on both sides of it.

George Poysky, RT 101:3 - 12

Q. What arrangements did you make specifically with Gene Sause & Company for insurance on the barge YCV-9?

A. I told him that we were going to need insurance; and he said, well, it will have to be surveyed.

And Dickieson's name was brought up. I presume that he hired him, approved him; and said that: "You're going to have to follow the surveyor's recommendations."

Q. You're speaking at that time with Mr. Doug Parks of Sause & Company?

A. Yes.

George Poysky, RT 146:4 - 19

Q. When you were testifying previously, you indicated that you thought Mr. Parks had a copy of the invitation to bid Exhibit 8, Plaintiffs' Exhibit 8, remember that testimony?

A. Yes.

Q. Why do you think he had that?

A. I believe I may have sent him one.

Q. When did you send it to him?

A. I don't remember.

Q. You just think you might?

A. I think I might have.

Q. And what would you say if it didn't appear in any of the files of Sause Company?

A. He may have pitched it in a wastebasket, or taken it home with him, or I don't know.

Q. Couldn't possibly be that you didn't send it to him?

A. I believe I did.

Capt. Coachman (of Tug MIKIALA II), RT 1454:11 - 16

Q. And how far from Honolulu were you on the 26th? That's also indicated in your log.

A. On the 26th?

Q. Yes, that's 200 — is that 270.3 miles from Honolulu and 2,151.5 miles from Seattle?

A. That's correct.

Capt. Coachman, RT 1397:7 - 1398:10

Q. Can you describe for us the attempt to try and reconstitute the bridle on the YCV-9? I'm referring to trying to pick it up again.

A. Yes. What I did, I heaved in on the YCV-9 wire, brought it up short, up to the emergency towing pennant, and when I got it up close, I knew that I couldn't get underneath the bow of the YCV-9 because it was just a little higher than the stern of the MIKIALA. And I knew if I got underneath there, it's going to puncture a hole in the MIKIALA or the barge and maybe sink us both. So, I stayed just a little bit away from it.

I had to concentrate pretty hard on this because I had the YFNB-13 on the long wire, so I had to watch this pretty close, real close; and Sonny Jiminez jumped — he was on the stern of the MIKIALA and he kind of jumped up — stepped up onto the bow of the YCV-9. And like I say, I couldn't really watch him. I had to make — I tried to stay as close to the YCV-9 without touching it, and I couldn't just watch him. I had to watch the barge. So, I was watching the barge really a lot closer than I was Mr. Jiminez.

Q. You were back on the after controls on the deck?

A. I was back on the after controls, right.

Q. What was the weather like? Swells?

A. The weather was pretty good. Real good, in fact. The weather was much — just almost all flat, pretty flat —real just —there must have been some swells out there, long swells, like you might see out over here on a calm day.

Q. What day was that?

A. I believe that was on the second.

Capt. Coachman, RT 1442:4 - 25

Q. When you first saw the crack in the bow of the barge, did you report that by radio back to Dillingham's office?

A. Yes, I believe I did.

Q. Was there any discussion with the office about turning around and coming back?

A. No, there was no discussion. There was no discussion. I didn't see any problem at that time, no.

Q. And that was reported on the 2nd of October?

A. Yes.

Q. Do your know how far across you were at that point?

A. The log would say what distance was. I'd have to refer to the log.

Q. Okay.

A. There's a hole there, but there's — it's 964 miles from Honolulu; one thousand something to Seattle. I can't — there's a hole right here. I can't read that.

Q. Oh. I'll pass you a copy of my log.

A. Okay.

(Document handed)

Q. Do you recall the total distance?

A. Yes. The total distance from Honolulu was 964.5 miles, and to Seattle, 1,459.1 miles.

George Poysky RT 103:1 - 19

Q. Can you describe when you first saw the barge after it arrived in Puget Sound, where it was, what its condition was?

A. Well, we met up at what we call the Shilshole buoy; and the tug that towed it in was there, and another Foss Tug was, if I believe, following it or in the area; and we went up with two tugs to bring it on down to the south buoy and it hooked on to — let's see, we brought the VC-9 in and tied it to the

south buoy, and left the other barge tied at the buoy, the existing buoy.

Q. Can you describe what the barge looked like as you saw it?

A. Well, it had somewhere between a 20 and 30% list. The bow was pretty well under water. The port side was probably down about six feet under the water.

The stern was probably 15 feet in the air, 20 feet in the air maybe; and there was five or six feet of freeboard under the rear rake.

Q. Where was the bridle at, at the time?

A. We couldn't see the bridle. The bridle was still attached to the towing end of it, and hanging down into the bay.

Stan Ogden, Pacmar Assistant Vice President in Charge of Underwriting, RT 1665:17 - 19

Q. Has Pacific Marine Insurance Company, to your knowledge, tendered back the premium to the insured under this policy?

A. To my knowledge, no.

Capt. De La Hunt; Independent Expert on Towing, RT 1567:18-1568:19; RT 1581:2 - 14

Q. Captain, what options did Captain Coachman have at the time that the bridle broke?

A. Well, he had a number of options. He could have shackled the emergency line on the tow, on the barge, into his nylon and returned to Hawaii. He could have called for an assist tug to come out and pick up this barge and take it back to Hawaii. He could have elected to connect his — the remaining piece of surge gear — the 20 to 30 feet that he recovered when the line broke, the surge chain broke — between the tug's towline and the emergency towline on the barge. He could have connected his nylon — the pennant on his nylon into the emergency towline and proceed on to Seattle or he could have done as he did. He hooked the towline and the

tug directly into the emergency towline on the barge and he towed without surge gear from the corner from there on.

Q. Do you have an opinion as to which option he should have taken or options?

A. Yes, I do.

Q. What is the basis of that opinion?

A. Well, the rule to — if you have broken gear, if you lose a barge, and you can't tow it in the manner that it's intended to be towed in, you return to the closest port. Barring that, he should have hooked up the nylon — which in the words of Captain Kapele is a rubber band — onto the emergency towline, made it fast to its H bitts and proceeded on. If he was going to tow it by the corner, that would have lessened the shock considerably the stresses -- the racking of the barge.

* * *

THE COURT: So, in your opinion, what should they have done with the YCV-9?

THE WITNESS: I would have put relieving tackle across the YCV-9, similar to that , to keep it from racking any further. And they are pulling both sides of the barge at the same time, this way they're pulling on only one side of the barge.

THE COURT: There would be pressure on both sides of it, but they would still be moving at that quarter angle, would they not?

THE WITNESS: They would be moving at the quarter angle, yes, sir. But it would relieve the racking pressure in that direction.